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Supreme Court, U.S.
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No. _____

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

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M. BIANCHI OF CALIFORNIA,
PETITIONER

v.

WILLIAM J. PERRY, SECRETARY OF DEFENSE,
RESPONDENT.

_____

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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PETITION FOR WRIT OF CERTIORARI

_____

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86 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether it is in the public interest to strongly incentivize future defense contractors to submit cost saving Value Engineering Change Proposals (VECPs) under future contracts, by paying a fair, contractually agreed to portion of initial cost savings to Petitioner from his military garment fabrication suggestions which have saved the government over $1.5 billion to date (as uncontested to by the government at trial).

2. Whether the U.S. government-drafted contract Value Engineering Incentive (VEI) clause should be liberally interpreted to carry out the mutual intent of the parties, as testified to under oath, that the government would share cost savings 50-50 (over a three year royalty period) with the Petitioner on all future affected end-item procurements which used his VECP suggestions.

3. Whether these important and farreaching questions of federal law concerning the standard VEI clause used in every Government contract should be settled by the Supreme Court rather than the U.S. Court of Appeals for the Federal Circuit, which recently held (contrary to the language of the clause) to severely limit VECP royalties to future purchases of the same end items as purchased in the contract under which the VECP was submitted.

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WILLIAM J. PERRY, SECRETARY OF DEFENSE,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

M. BIANCHI OF CALIFORNIA, the Petitioner herein, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Federal Circuit, entered in the above-entitled case on July 21, 1995.

OPINIONS BELOW

The July 21, 1995 opinion of the U.S. Court of Appeals for the Federal Circuit, whose judgment is herein sought to be reviewed, is unpublished (except as to notice of affirmance at 61 F.3d 920), and is reprinted in the attached Appendix A to this Petition, at p. 17. The prior opinion of the U.S. Armed Services Board of Contract Appeals, entered September 30, 1993, is reported at 94-1 BCA ¶26,417, at page 131,405; and is reprinted in the attached Appendix B to this Petition, at p. 24.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on July 21, 1995. The jurisdiction of this Court is invoked pursuant to title 28, U.S.C. § 1254(1).

GOVERNMENT REGULATIONS INVOLVED

This case involves the following, government Value Engineering Incentive (VEI) regulations in the Armed Services Procurement Regulation (ASPR), as superseded by the Defense Acquisition Regulation (DAR), and currently the Federal Acquisition Regulation (FAR): ASPR § 1-1703.1 and .2 (entitled "Acquisition Savings" and "Collateral Savings", respectively); ASPR Clause 7-104.44, subparagraph (e) (entitled "Sharing"); and ASPR 1-1706, promulgated by Defense Acquisition Circular (DAC) #76-26, which identifies the "Sharing Arrangements" for all affected end items for supply and services contracts and for construction contracts. These regulations are reprinted in pertinent part in Appendix E, at p. 66.

STATEMENT OF THE CASE

1. Background

The Value Engineering Incentive (VEI) clause is a provision common to all government contracts. The Department of Defense (DoD) pioneered value engineering in 1961 through regulatory policy and clauses, which were revised in 1964, 1967, 1974 and 1977.[1] The DoD attempted to provide sufficient incentive to induce supply and services contractors to submit cost savings ideas, called Value Engineering Change Proposals (VECPs), to the DoD by promising to pay the contractor 50% of the government's cost savings (for an initial 3 year royalty period) for its use of essentially the same item (i.e., the VECP suggestion) in all "affected" end items in instant, concurrent and future contracts of the procuring activity. The government keeps all cost savings beyond the 3 year royalty period. Engineering development or low rate initial production contracts (such as a "production test" or "limited production" contract), use a future royalty cost sharing period which is the highest 36 consecutive months of planned government production when the VECP is accepted.

The VEI Clause was quite literally intended to strongly incentivize contractors to submit cost savings ideas to the DoD. However, when it comes to actually compensating the submitter of a VECP suggestion once its received, the government is often tempted to hold down awards by setting up two hurdles which tend to prevent the submitter from receiving a reasonable reward...or any reward at all, as in this case.

First, the government agency can simply hold up review or approval or implementation of the VECP until after the submitter's "instant" contract is fully paid for and closed out...and the contractual relationship has ended.[2]

Secondly, even if the VECP is accepted and implemented into the instant contract, the procuring agency (or the Federal courts) can narrowly interpret the language of the VEI Clause so as to only allow VECP royalties on concurrent or future contracts for the "the same" military garment as initially supplied by the submitter. They deny any reward for hundreds of thousands of other "affected end-item" garments purchased by the government on future contracts which utilize the very same VECP idea.

The "net" result is an extremely disenchanted and disincentivized contractor who is not about to submit another cost savings idea to the DoD. This results in exactly the opposite result than the drafters of the VEI Clause intended.

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1 II Nash & Cibinic, Federal Procurement Law 1194 (3d ed. 1980)

2 John J. Kirlin, Inc. v. United States, 827 F.2d 1538,1541 (Fed.Cir.1987); and M. Bianchi of California v. Perry, 31 F.3d 1163, 1167-68 (Fed.Cir.1994).

The Federal Circuit has recently established this narrow interpretation, which is contrary to the weight of lower court ASBCA case precedents which urge a liberal interpretation favoring contractors so as to maximize future VECP submissions. This is an important question of first impression which the Supreme Court has never addressed, and is too important to leave with the Federal Circuit.

2. The Bianchi VECPs

M. BIANCHI OF CALIFORNIA (MBOC), is a sole proprietorship. In 1979 and 1980 MBOC was competitively awarded three contracts by the DLA's Defense Personnel Support Center, in Philadelphia, PA (DPSC) for the production of U.S. military garments in various amounts. MBOC's first contract was for 43,000 Navy enlisted men's raincoats, the second contract was for a production "test" run of 26,250 Air Force women's pantsuit coats, and the third contract was for "limited" production of 125,240 Army men's all weather coats.

MBOC was informed by the DPSC of their VEI Program even before he bid on these contracts, and each contract contained the VEI clause (identified in their Master Contract Terms as the JO9 Clause). He subsequently submitted eight VECP's, five of which are the subject of this appeal, all of which were denied any sharing of cost savings by the DPSC. MBOC submitted claims for all of these VECPs which DPSC failed to respond to, such that in 1988 MBOC appealed them to the Armed Services Board of Contract Appeals (ASBCA) under the jurisdiction of 41 U.S.C., § § 605(b), 606, and 607. The ASBCA severed the appeals into three VECP categories for hearings:

(a) The Stitching claim (VECP 8680), for about $6 million, which eventually resulted in an ASBCA award of $58,613.03, plus interest.[3]

(b) The Boxes claims (VECPs 1180 and 8780), for about $30 million, for which the ASBCA denied any award, and which the Federal Circuit vacated and remanded to the ASBCA[4]; and

(c) The Interlining, Gimp Thread and Label claims (VECPs 1280, 1380, 2181, 2880, and 3380) for about $207 million, for which the ASBCA denied any award, and the Federal Circuit affirmed[5], and is the subject of this Petition.

This appeal involves the third category of VECP claims. Three of the VECPs (3380, 1280 and 2181) suggested changing expensive woven, fusible interlining (in collars, cuffs, etc.) of military garments for a new European style Pellon #SG413/#8325 series nonwoven fusible interlining, which could

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3 M. Bianchi of California, ASBCA No. 36518, 93-2 BCA ¶25,801 (Feb.10,1993), aff'd mem CAFC No. 93-1402 (Feb.16, 1994)

4 M. Bianchi of California, ASBCA Nos. 37029 & 37071, 93-1 BCA ¶25,309 (July 31,1992), vacated 31 F.3d 1163 (Aug.10,1994)

5 M. Bianchi of California, ASBCA Nos. 37395 et al., 94-1 BCA ¶26,417 (September.30,1993), affirmed 61 F.3d 920(July 21,1995)

be fused to the military garment via Pellon's new "point seal" process, saving substantial labor and material costs per garment, as well as collateral storage and handling costs.

This suggestion was repeatedly submitted by MBOC (on all three contracts) at a time when the government's fusible interlining program was at an absolute "standstill" (on October 26, 1979). Appendix F, at p.78, contains a government memorandum that confirms this fact.

Samples of Mr. Bianchi's new Pellon interlining fabric were tested at the U.S. Army Research & Development Center, Natick, MA from July 1979 (on the Navy garment contract) through written acceptance of the same Pellon interlining suggestion (VECP 2181) on March 31,1981, and incorporation into the third MBOC contract as a change to the manufacturing interlining component specification for the Army's all weather coat.

At the ASBCA Hearing on April 20-23,1992 MBOC submitted 41 changed U.S. military garment specifications into evidence (without government objection, or subsequent contradiction), 28 of which now require "mandatory use" of nonwoven fusible interlining components (i.e., Pellon SG#413/#8325 or equivalent), and 13 which allow nonwoven fusible interlinings as an alternate component.

Another idea (VECP 1380) suggested substituting inexpensive cotton V-T-280 button thread for silk thread around the gimp of buttonholes for the Air Force's pantsuit coats. This VECP was also expressly accepted by DPSC on May 20, 1980 and November 3, 1980 in contract changes to the garment specification. At the ASBCA Hearing on April 20-23,1992 MBOC submitted 32 changed U.S. military garment specifications into evidence (again without government objection, or subsequent contradiction) all of which now require cotton V-T-280 button thread as a "mandatory requirement".

A third idea (VECP 2880) suggested substituting one garment label which combined size and identification information (previously included on two labels) on the Air Force's garment. This suggestion was denied by the DPSC on April 2, 1980. However, the DPSC constructively accepted this suggestion. At the ASBCA Hearing during April 20-23,1992 MBOC submitted 13 changed U.S. military garment specifications into evidence (without government objection, or subsequent contradiction), 7 of which require "mandatory" use of MBOC's suggestion.

MBOC asked the ASBCA for concurrent and future contract "acquisition" savings and "collateral" savings on all affected U.S. military end-items wherever the VECPs were used on buttonholes and interlinings, and wherever separate labels were combined, and that required the above changed specifications. During the ASBCA Hearing on April 21-23,1992 the cost quantum savings were demonstrated by MBOC via uncontradicted testimony of three expert witnesses who authenticated one hundred (100) separate

volumes of evidence concerning DPSC's future contract procurements and cost savings data, calculations and reports, which in total cumulated to be about 15 feet thick. The government was simply overwhelmed and did not, in fact, contest any of MBOC's quantum evidence, it simply contested MBOC's entitlement to any cost savings under its interpretation of the language of the contracts' JO9 Value Engineering Clause. That is a fact. Government counsel even stated that they would beat MBOC on the entitlement issue, not the quantum of damages issue.

MBOC experts testified as to engineering, labor savings and extended life cycles for each "affected" end-item specification. MBOC also submitted uncontradicted evidence of the procurement history of each "affected" end-item garment (and its underlying specification) over the applicable royalty period. This evidence included voluminous back-up documentation obtained by government computer data analysis of two databases (called "Haystack") which provided MBOC's experts with information on DLA military garment contracts for each "affected" end-item specification from as far back as 1980 through the Hearing in 1992. The ASBCA had previously found this database analysis to be a completely satisfactory, and a fair method for MBOC to identify quantities of "affected" end-item specifications in his first Hearing on the Stitching appeal.[6]

Uncontradicted proof submitted into evidence by MBOC at the ASBCA Hearing demonstrated that BIANCHI's interlining VECP suggestion alone generated over $350 Million in acquisition and collateral savings over the initial 3 year royalty period. This resulted in an uncontested interlining quantum claim of $176,825,130.00.[7] The subsequent 10 year period has been "royalty free" to the government, and should have generated an additional $1.1 Billion or more of additional savings...a little over $1.5 Billion of total savings to date.

At the ASBCA Hearing the government introduced two witnesses which strongly supported MBOC on his entitlement to these royalties. Mr. Bruce A. Snigger, Senior Textile Technologist at the Natick, MA test lab, testified on April 28,1992 that the government tested MBOC's new Pellon nonwoven fusible interlining samples and that they exhibited "unique properties...that would perform as [DPSC] wanted it to", and he wouldn't have accepted VECP 2181 otherwise.

Further, Ms. Susan Lynn Caso, DPSC's Value Engineering Specialist (who was present as the government's consultant during the entire 9 day trial) testified on April 27, 1992 that when a component...such as "buttons, threads, cloth, zippers, slide fasteners..." were changed as a part of an accepted

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6 M. Bianchi of California, supra note 3, at pages 128,403 and 129,405

7 M. Bianchi of California, supra note 5, at page 131,417.

VECP and it is used in an affected end-item garment (other than in the instant contract), then the contractor would receive royalties on the use of his VECP "component specification" in all affected "end-item specifications".

This testimony was in harmonious agreement with Mr. Bianchi's trial testimony concerning DPSC's Standard JO9 VEI Clause...i.e., that MBOC would be compensated for its interlining and thread component VECP suggestions, once approved by the DPSC, which are used in all affected end-item garments procured by DPSC on future contracts within the royalty period. This was also identical to Ms. Caso's testimony on March 1, 1991 in the earlier ASBCA Hearing in MBOC's Stitching claim.

Nevertheless, the ASBCA rejected MBOC's claims, holding as a matter of law that the doctrine of constructive acceptance does not apply to three VECP claims (3380, 1280, 2880), and that even though VECP 2181 was accepted by the DPSC it wasn't "implemented" in the instant contract so as to have a unit cost reduction (under the instant contract) to apply to concurrent or future contract savings. Therefore, the ASBCA erroneously concluded that there is no legal basis for MBOC to recover future contract savings (contrary to the language of the VEI clause).

Further, the ASBCA rejected the fact that MBOC had submitted "new" interlining suggestions (VECPs 1280, 3380 and 2181), even though internal DPSC and the Natick, MA laboratory documents and government testimony conclusively established otherwise. DPSC had "accepted" VECP 2181 as a change to the interlining specification because it was new, unique and it worked.

Incredibly, the ASBCA also held that the record shows "no evidence" of any changed military specifications, nor cost savings... regardless of MBOC's unchallenged submission of days of expert testimony and 100 volumes of cost data, analysis and reports that proved to the contrary.

The U.S. Court of Appeals for the Federal Circuit affirmed the ASBCA on July 21, 1995, stating that there was no constructive acceptance by DPSC of VECPs 3380, 1280 and 2880. It also narrowly interpreted the JO9 VEI Clause to mean that MBOC could only recover for the use of the VECP 2181 nonwoven, fusible interlining on future DPSC contracts purchasing essentially the same [end] item garment (ie., the same Army all weather coats)...but that since no contractor ever implemented VECP 2181 on future contracts, no royalties were due MBOC. This finding was incorrect, and the entire record proved it.

The Federal Circuit declined to address MBOC's VECP 1380 (cotton gimp) appeal by completely ignoring it in its July 21st Decision.

REASONS FOR GRANTING THE PETITION

Petitioner MBOC was a seasoned commercial garment manufacturer in 1979. He was recruited by his local Long Beach, CA Congressman to enter into the government arena after Mr. Bianchi made a speech to local businessmen and government personnel. He was told that DPSC had no major supplier for uniforms West of the Mississippi River. He brought with him a competitive eagerness, and a certain sense of patriotism...plus valuable ideas from his commercial experience.

He quickly visited DPSC in Philadelphia and was informed of their VEI Program. They told him if he submitted VECPs, and they were used by the Government that he would share in the cost savings. DPSC used examples. If he suggested a new inexpensive type of uniform "button" then, MBOC would share in all savings from its use on all types of uniforms that DPSC buys. Another example was "black dye". If MBOC submitted a better, cheaper dye, then wherever it was used he'd share in cost savings. A strong incentive to submit VECPs to be sure.

MBOC took the government's words to heart. He bid, and won, a DLA contract for a Navy enlisted men's raincoats in rather quick fashion in the summer of 1979. MBOC immediately applied for a VECP suggestion for replacing the specification's collar, sleeve and facings with a new Pellon SG#413 nonwoven, fusible "interlining" that used a point seal fusing process developed and patented for the commercial industry by the Pellon Corporation in West Germany. It had never been used anywhere in the United States. He submitted Pellon fabric samples for testing with the VECP.

He submitted the same suggestion four more times over the next 15 months on his initial Navy garment contract, and also on two additional competitively awarded DLA contracts for Air Force and Army garments. DPSC thoroughly tested the new interlining at its Natick, MA laboratory during that period and finally approved his fifth interlining VECP (No. 2181) on March 31, 1981...over 20 months after the suggestion was first submitted by MBOC.

That exceptional nonwoven, fusible interlining suggestion has reaped a phenomenal cost savings for the U.S. Government since it was formally implemented by DPSC into MBOC's contract. The government saved over $350 million in the first 3 year (royalty) use period...and over $1.5 billion to date. This is the equivalent to eight new C-17 airlifter aircraft.[8]

Wasn't this precisely what the VEI Program was intended for?

However, there is a dark side of the MBOC story. MBOC hasn't been paid for his suggestion.

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[8] D. Fulghum, Aviation Week & Space Technology 76 (Nov.6, 1995)

As surely as I write this Petition, and as you read it, the outcome of MBOC's 15 year quest for a reasonable reward will have an important impact on the VEI Program for the entire defense industry and all government cost savings incentive programs.

The MBOC trilogy[9] of VEI cases are being closely followed by the defense industry in periodical articles and timely commentary. The Federal Circuit first established a restrictive case precedent on the VEI Clause in 1987.[10] Its three subsequent MBOC decisions (in 1994 and 1995) have, I believe, eroded away any remaining credibility in the VEI Program that the DoD may have left.

This Court has never before been asked to decide how it would stimulate defense contractors via the VEI clause. The ASBCA has generally ruled that a liberal interpretation favoring royalty compensation should be encouraged in order to achieve maximum savings ideas for the Government[11]. The incorrect interpretation of the Court of Appeals misreads the language of the clause and will effect a contrary result. Defense contractors are extremely concerned about it. There are special and important public reasons for this Court to hear the issue before its impact is felt throughout the government's cost savings incentive programs.

1. The Value Engineering Incentive (VEI) Clause Will No Longer Provide Contractors With An Incentive To Submit VECPs To The Government If It Is Interpreted So Narrowly As To Negate The Government Stated Purposes Of The Clause And A Reasonable Reading Of The Royalty Sharing Provisions Of The Clause Itself

It is fair to say that the Bianchi trilogy[12] of VEI clause cases are being closely followed by the defense industry. To date notable legal commentators on MBOC's cases have universally lamented that this is no way to incentivize contractors! Recent 1994-95 published comments on the Bianchi decisions have intoned (and I quote verbatim):

> "As a matter of policy, the Government should find some way (by amendment to regulations or endorsement of the implied contract theory) to pay contractors when the Government utilizes the ideas in a value engineering proposal on subsequent contracts. The Government's policy is to encourage value engineering. It is difficult to find a way more calculated to discourage value engineering proposal preparation and submission than to let the Government `appropriate' contractor's ideas without payment."[13]

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9 M. Bianchi of California, supra notes 3, 4 and 5

10 John J. Kirlin v. United States, supra note 2

11 Gulf Apparel Corp., ASBCA No. 27784, 89-2 BCA ¶21,735 (1989), at p. 109,266

12 M. Bianchi of California, supra notes 3, 4 and 5

13 BRIEFING PAPERS. (January 1994), pp. 32-34.

"Indeed, if the Government as a policy matter really wants to encourage contractors to generate cost savings (as many senior policy making officials have often stated), one would have thought it could have achieved the same result by being receptive to a more liberal interpretation of the current `VEI' clause language than it seems to have been in cases like Bianchi. having resisted that approach, however, it may well be that the Government should limit its expectations regarding the results of the value engineering program unless it is willing to revise the `VEI' clause to eliminate language that can be interpreted to discourage contractors from spending the money needed to generate the ideas the Government says it wants."[14] (emphasis added)

"Although the court's decision ultimately offered Bianchi another limited chance to prove its case, the inherent unfairness in the court's reliance on Kirlin will not promote contractors' faith in the VECP process...While the general concept that contract completion extinguishes the Government's right to accept a VECP is a simple, bright-line rule for the Government, contractors and reviewing tribunals to follow, it ignores the inequities that exist when the Government simply reject a VECP, waits until the termination of the contractual relationship, and accepts the same proposal offered by another contractor or independently initiates the change on its own, allowing the Government to avoid compensating the original developer of the savings 'concept'."

"The court did not discuss Bianchi's Value Engineering clause in detail; however, the clause's unambiguous statement that acceptance of the VECP could occur `within a reasonable time after performance has been completed under this contract' could have provided the necessary springboard for undoing what appeared to be an injustice to Bianchi."[15] (emphasis added)

"One of our earliest criticisms of a decision of the U. S. Court of Appeals for the Federal Circuit was in Value Engineering: The Federal Circuit Kicks a Wounded Dog, 1 THE NASH & CIBINIC REPORT, Para. 93. We took offense at the holding in John J. Kirlin, Inc. v. U.S., 827 F.2d 1538 (Fed.Cir.1987),...that Government use of the idea in a value engineering change proposal was not compensable if it occurred after `completion' of the contract. We concluded that this was poor value

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[14] 36 The Government Contractor, (Sept.21,1994)

[15] M. Clancy & V. Antonacci, 1994 Year In Review: Analysis of Significant Federal Circuit Government Contracts Decisions, 24 Public Contract Law Journal, No. 2 (Winter 1995), pp. 201-202

engineering policy because it discouraged contractors from submitting VECPs and poor Government contracting policy because it assumed that contract clauses were not operative after completion. The latter assumption is clearly ridiculous and would wreak havoc if applied generally. For example, what would it do to the Government's rights under the `Patent Rights' or `Rights in Technical Data' clauses? Where would it leave the `Disputes' clause? Need we go on?" (emphasis added)

"It seems to us that this is a case of winning a battle but losing the war...Government wins by making arguments that work against its best interest. The Bianchi decision greatly reduces the incentive of concurrent and future savings that the "Value Engineering" clauses give to contractors to induce them to submit VECPs. This is particularly true in the case of agencies that do not process VECPs promptly - where almost the only incentive is concurrent and future savings. Thus, establishing this legal rule will induce intelligent contractors not to submit VECPs."[16] (emphasis added)

Mr. Ralph Nash, a highly respected legal educator, author, and consultant to government and industry, puts the issue in the proper perspective...the government has won the battle but will surely lose the war.

If this Court orders that Mr. Bianchi should be paid for the actual use of his interlining VECPs in all "affected" military end-item garments the beneficial result to the government would be dramatic. When word of a positive Decision is announced to the defense contracting community it is reasonable to expect a flood of cost savings suggestions.

This issue is of exceptional importance to the defense community, the public and the government, particularly as the fallout from decades of deficit budgets and deficit spending critically impacts our ability to fund essential government programs. The government needs every cost savings idea now more than any time in recent history.

2. A Liberal Interpretation of The VEI Clause's Royalty Sharing Provisions Will Benefit The Government And Makes Sense

The principle that when in doubt "liberally" interpret all VEI Clauses in favor of royalty compensation should be encouraged. In an earlier case before the ASBCA the DPSC was specifically advised that its VECP program requires "open handed and ever generous administration" if it is to achieve maximum savings ideas for the government, stating:

"If the sharing provisions were to be interpreted and administered strictly with an eye to holding down rewards, the incentive to propose or urge

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[16] R. Nash, VALUE ENGINEERING: Another Illusory Promise?, 9 THE NASH & CIBINIC REPORT, No. 3 ¶20 (March 1995), pp. 42-43

adoption of money-saving devices and procedures would be eliminated, the flow of suggestions would dry up, and the program would die."[17]

This principle goes back almost 30 years at the ASBCA. Industry comments on the Bianchi cases (quoted above) are strongly in favor of liberal interpretation as the way to positively encourage VECPs. It is in the public interest for this Court to consider the benefit of such a liberal policy before the Court of Appeals conclusively establishes the latest Bianchi decision as a major roadblock...which may fatally undercut that common sense public policy and the intent of the current clause.

3. The Supply Contract VEI Clause Literally Contemplates Royalties For "Concurrent" and "Future" Contracts Which Occur After Performance Of The "Instant" Contract Has Been Completed, And Should Be Treated Differently Than The Construction Contract VEI Clause

The Federal Circuit applied its holding in John J. Kirlin Inc. v. United States, 827 F.2d 1538 (Fed.Cir.1987), a "construction" contract case, to the VEI clause contained in MBOC's three "supply" contracts. Although the Kirlin opinion doesn't otherwise identify the clause, the standard construction contract VEI clause does not allow any cost sharing for acquisition savings other than on the "instant contract".[18]

Further, the December 15, 1980 DAC #76-28 version of the VEI clause explicitly states in ASPR § 1--706.1(b) that "[s]haring on construction contracts applies only to savings on the instant contract." [see Appendix E]

In Kirlin, from the onset, the defense contractor never had any legitimate "expectation" of future or concurrent or collateral savings if a VECP was submitted. Conversely, MBOC's "supply" contracts contained a different VEI clause. Under the sharing provision of MBOC's JO9 (VEI) clause, the government explicitly provided for not only instant savings, but for future and concurrent savings as well.

The Federal Circuit's reassertion of the Kirlin holding in the latter two Bianchi cases works an extremely harsh result.

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[17] Gulf Apparel Corp., ASBCA 27784, 89-2 BCA ¶21, 735 (1989) at 109,266. See also Philco-Ford Corp., ASBCA No. 16197 BCA ¶9917 (1973), at 46,493; Northeastern Manufacturing and Sales, Inc., ASBCA No. 38307, 90-1 BCA ¶22,562, (1980), at 113,229; W.R. Johnson, Inc., ASBCA Nos. 40251 et al., 91-3 BCA ¶24,172 (1991), at 120,913; and B.F. Goodrich Company v. United States, 398 F.3d 843,848 (Ct.Cl.1968).

[18] ASPR § 7-602.50 (entitled "Value Engineering Incentive-Construction"); II Nash & Cibinic, Federal Procurement Law 1194 (3d ed. 1980); cf. 2 Steiger, Federal Contract Management, ¶8.05[3][a], note 5(19993); CCH Government Contract Reports, ¶21,700 at p.10,401 (Feb.2,1992); accord Umpqua River Navigation Co., ENGBCA No. 3381, 78-1 BCA ¶13,051 (1978), at p. 63,740

The net effect of the Boxes VECP Decision last August 1994 coupled with the instant Interlining VECP Decision is to kill "constructive acceptance" possibilities for supply and service contractors. As indicated by several defense industry commentators, this could perpetuate poor value engineering policy and poor government contracting policy because it actually discourages contractors from submitting VECPs. The public has to important an interest in this concept not to have a hearing, and this Court's reconsideration of the negative implications of this precedent.

4. Under the Cardinal Rule of Contract Interpretation a Contractor's VEI Clause Should Be Uniformly Interpreted To Carry Out The Mutual Intent Of The Parties. The MBOC Interlining Decision Threatens That Principle for Government Contractors.

Hearing testimony by the government's VECP expert witness, Susan Caso, on April 27, 1992, and Mr. Bianchi himself earlier in the trial, indicate that they both interpreted the DPSC's Standard JO9 Clause in harmonious agreement...i.e., that MBOC's Pellon nonwoven, fusible interlining and cotton thread component VECP suggestions, once approved by the DPSC, would be compensated for all end-item garments procured by the DPSC on future contracts which have incorporated his VECP suggestions within the royalty period. Further, Ms. Caso's testimony was identical one year earlier in the MBOC Boxes VECP claim Hearing.

This interpretation was not only mutually understood by both parties, but it gives a fair and reasonable interpretation to all parts of the JO9 Clause, including that language concerning cost sharings royalties for "all affected end-items", which language was completely ignored by the Federal Circuit in its July 21, 1995 opinion (and its earlier Boxes opinion on August 10,1994).

Prior case law in the Federal Circuit indicates that contract language should be interpreted as a whole so as to harmonize and give meaning to all of its provisions and the parties understanding of the clause as shown by their conduct before the controversy. Under the cardinal rule of contract interpretation the contract must be interpreted to carry out the mutual intent of the parties.[19]

In the Julius Goldman's Egg City v. United States[20] the Federal Circuit interpreted the party's mutual intent, via the entire contract, stating:

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[19] Julius Goldman's Egg City v. United States, 6997 F.2d 1051,1057 (Fed.Cir.1983); Thanet Corp. v. United States, 591 F.2d 629,633 (Ct.Cl.1979); Randolph Engineering Co., ASBCA No. 4872, 58-2 BCA ¶1053 (1958), at p.867; State of Arizona v. United States, 575 F.2d 855,863 (Ct.Cl.1978); AID Request for Decision, B-210103, 83-2 CPD ¶116 (1983), citing S. Williston, A Treatise on the Law of Contracts, (3d ed 1961) § 618; and J. Gabig & C. Cook, A Guide To Interpreting Contracts, 23 NCMA Journal, No.1 (1989) p.1.

[20] Julius Goldman's Egg City v. United States, supra note 19.

"Contract interpretation has been consistently viewed as a harmonizing process in which the various parts of a disputed contract are to be construed as a whole to give meaning to all of its provisions. In *State of Arizona v. United States*, 575 F. 2d 855,863 (1978), the Court of Claims held that: "[w]e follow the established general rules that provisions of a contract must be so construed as to effectuate its spirit and purpose, that it must by considered as a whole and interpreted so as to harmonize and give meaning to all of its provisions, and that an interpretation which gives a reasonable meaning to all parts will be preferred to one which leaves a portion of it useless, inexplicable, inoperative, void, insignificant, meaningless, superfluous, or achieves a weird and whimsical result."[21] (emphasis added)

Two Air Force officers recently wrote an excellent article on the law of government contract interpretation.[22] They state, "the cardinal rule is the highest rule of contract interpretation", and that a judge must ascertain the mutual intent of the parties as manifested in the contract, including evidence of oral testimony.[23]

Ms. Susan Caso, the Government's Value Engineering Specialist (the Government's expert consultant during the entire 9 day trial) testified under oath on April 27, 1992 that when a VECP suggestion for new component items such as "buttons, threads, cloth, zippers and slide fasteners" are used by the Government in an "end item" (other than on the instant contract) then the contractor would share in cost savings for the use of his "component specification" in all "affected" end item specifications.

In the Boxes VECP claim Hearing, on March 1, 1991 Ms. Caso similarly testified while under direct examination by Government counsel:

"BY MS. ZIMMT-MACK:

Q. Does your office ever apply this term so that a contractor obtains royalties for use of the VECP in contracts for items other than the end-item which he originally had the contract for.?

A. Yes, we do.

Q. Under what circumstances?

A. When the value engineering change has been implemented as a result of a component contained within that end-item requirement.

Q. As in your discussion of the webbing, is that correct?

A. That's correct." (emphasis added) ASBCA No. 36518 Transcript page 5-42.

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21 Id.

22 See Generally, J. Gab & C. Cook. A Guide To Interpreting Contracts, 23 NCMA Journal, Issue No. 1, page 55.

23 Id., note 4.

Ms. Caso had testified earlier in the day that a change in the construction of "webbing" would be an example of a component VECP suggestion that automatically resulted in its incorporation into other end items for royalty purposes:

"Q. Would you explain a value engineered component?

A. Well, a value engineered component indicates that at the time that the approval is loaded into the contracting tech data file, that one action taken to incorporate it into the file resulted automatically in the incorporation of a valued engineered component in other items.

Q. Wells, explain what the component would be?

A. An example of a component would be if a contractor were to recommend a change to the construction of webbing, if he recommended using a shutteless loom construction in lieu of a shuttle machine to make the webbing. When the change is loaded into the contracting technical data file, it is loaded in for the webbing. By loading those changes in for the webbing, anywhere that webbing is a referenced document in some end item --

Q. In other words, anywhere the webbing is used to make the end item?

A. Exactly. Anywhere that one action resulted in the incorporation of this VE into other items, because it was listed as a component." (emphasis added) ASBCA Nol 36518 Transcript, pages 5-13 and 5-14.

MBOC's VECP 2181 interlining suggestion is a component VECP suggestion (like webbing). The Government's above-quoted interpretation in that circumstance would allow him royalties when that new component was used "for items other than the end-item which he originally had a contract for". That was the mutual intent of the parties. This interpretation gives reasonable meaning to all parts of the JO9 Clause.

This Court of Appeal's finding interpreted only the words "essentially the same items". It ignored the words "all affected end items" in Clause JO9 and, thereby, rendered them wholly imperative, meaningless and superfluous. That result will no doubt be confusing to the defense contractor community.

Contractors won't believe what the VEI clause says even if its rewritten by DoD if the courts continue to misconstrue it in order to the limit recovery of royalties. Again, this Court has the opportunity to correct this farreaching interpretation which undercuts the VEI Program.

5. MBOC Submitted Uncontradicted And Overwhelming Proof Into Evidence At The Trial That VECP No. 2181 Was Accepted By The Government, The Specification Was Changed To Incorporate MBOC's VECP Non-Woven Fusible Interlining Suggestion, And That Other Contractors Did, In Fact, Implement MBOC's Suggestion On "Future" Contracts.

At the April 1992 ASBCA Hearing MBOC's expert witnesses authenticated 100 thick volumes of MBOC's Trial Exhibits of applicable garment contracts,

specifications calculations and analysis regarding "future" Government contracts. This evidence was almost 15 feet in width. Three expert witnesses, in addition to Mr. Bianchi, testified over 3 days at the Hearing and introduced these one hundred Trial Exhibits into evidence without Government objection:

Witness	Date	Trial Exhibits
James W. Sutherland,Ph.D.	04/21/92	Nos. 1000-1039
		Nos. 1049-1073
		Nos. 1080-1092
George Davidson	04/22/92	No. 1094
Peter Elliott, CPA	04/23/92	Nos. 1040-1042
		No.1074
		No. 1093

MBOC thoroughly briefed the Court of Appeals concerning these Exhibits, but did not include all the 100 volumes supporting cost savings evidence into the Joint Appendix on appeal before the Federal Circuit because it would have overloaded the Court Clerk. Nevertheless, under Fed.R. App. P., Rule 30 (a) this evidence is a part of the Court's record even though they're not phycially included in the Appendix on appeal.

As to Mr. Davidson, MBOC included his entire 233 page report in the Appendix on appeal. As to Mr. Elliott, MBOC included only Trial Exhibit No. 1042 (concerning VECP 2181 calculations) which itself was 154 pages long. Each of Mr. Elliott's 4 other supporting Trial Exhibits were just as lengthy.

As to Dr. Sutherland, MBOC introduced into evidence no less than ninety-four (94) separate and distinct Trial Exhibits...one for each military specification for each of five VECPs that implemented MBOC's VECP suggestions. Due to the sheer number of these 94 volumes we could not include them in the Joint Appendix on appeal; and we told the Federal Circuit this. MBOC briefs contained a 4 page list of these 94 Trial Exhibits.

In particular, Trial Exhibit 1029 details government contracts for the "identical" Army allweather coat that implemented MIL-C-44030 changes due to MBOC's VECP 2181 (i.e., non-woven fusible interlining) suggestion.

Trial Exhibit 1029 contains 217 pages of very detailed evidence on specific "future" contracts for the identical item by contractor name, DLA contract number, quantity, price, dates, SRC and DD numeration. MBOC's VECP 2181 was implemented in identical Army coat contracts, at a cost savings alone of almost $30 million.

There is no competent evidence to support the ASBCA's contrary findings on this damages issue, nor the Federal Circuit's endorsement of this erroneous fact.

The Government submitted no contrary evidence whatsoever during the April 21-28, 1992 ASBCA Hearing. It consciously chose to ignore the

quantum of damages. The Government also did not dispute this fact in its brief before the Federal Circuit.

What level of VECP proof will ever satisfy a federal court? Is the court system simply stuck on the "size" of MBOC's potential royalties, rather than the phenomenal size of the cost savings to date? MBOC's royalties (if compensated in full) would only equate to about eleven percent (11%) of the total cost savings benefit realized by the government as of today. Again, defense contractors will be frustrated and disincentivized when they learn about the level of proof that MBOC entered into evidence only to be denied any recovery.

CONCLUSION

WHEREFORE, Petitioner respectfully prays that writ of certiorari be granted for the Supreme Court to consider and decide this important federal question.

/s/

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APPENDIX A

OPINIONS BELOW:

U.S. COURT OF APPEALS FOR THE FEDERAL CIRCUIT
ON JULY 21, 1995

NOTE: Pursuant to Fed. Cir. R. 47.6, this disposition is not citable as precedent. It is a public record. The disposition will appear in tables published periodically.

United States Court of Appeals for the Federal Circuit

94-1166

M. BIANCHI OF CALIFORNIA,
Appellant,

v.

William J. Perry
DEPARTMENT OF DEFENSE,
Appellee.

DECIDED: July 21, 1995

Before RICH, NEWMAN, AND RADER, Circuit Judges.

RICH, Circuit Judge.

DECISION

M. Bianchi of California (MBOC) appeals the September 20, 1993 decision of the Armed Services Board of Contract Appeals (ASBCA or board) in ASBCA Nos. 37395, 37798, 42243, 42244, and 42416 (consolidated), denying MBOC royalties based on five Value Engineering Change Proposals (VECPs). We affirm.

DISCUSSION

MBOC is a government contractor for military garments. This appeal involves three contracts and five VECPs. Three of the VECPs suggest changing the interlining in specific military garments from a woven material to PELLON, a nonwoven fusible material. Of the other two VECPs, one suggests changing the type of thread around button holes, and the second suggests combining size labels in specific garments.

MBOC submitted five claims to the Contracting Officer. A final decision was never issued, and MBOC took five separate appeals to the board where they were consolidated. Before the board, MBOC asked for concurrent, collateral, and future contract savings on all items with button holes, wherever nonwoven fusible interlining is used, and wherever separate labels are combined claiming that they all meet "essentially the same items" clauses of the contracts. MBOC seeks royalties, from 1988 to 1990, of approximately $180,000,000 for these suggestions.

The board unanimously rejected MBOC's claims holding as a matter of law that the doctrine of constructive acceptance does not apply to MBOC's claims, that no instant or concurrent savings were created by MBOC's VECPs, and that the Value Engineering Incentive (VEI) clause does not provide for collateral savings. Below is a table relating the contracts, the VECPs, and the board's findings.

Contact #	Description	VECP No.	Description	ASBCA Findings
DLA-100-79-C-2894	Navy raincoats: ordered 43,000 with option for 21,500; delivered 43,952; contract terminated for default on 10/29/81.	3380	Change interlining from fusible woven material to PELLON on men's NAVY raincoats.	a) rejected by gov. b) not implemented c) none of the future contracts were for "essentially the same items"

Contact #	Description	VECP No.	Description	ASBCA Findings
DLA-100-80-C-2290	Air Force women's pantsuit coat: ordered 26,250; gov. considered performance complete on 12/9/80.	1280	Change interlining from hair, wool, rayon, or cotton to fusible PELLON on women's Air Force pantsuit coats.	a) rejected by gov. b) not implemented c) none of the future contracts were for "essentially the same items"
		1380	Change thread for buttonhole gimp on women's Air Force pantsuit coats from silk to polyester.	a) none of the future contracts were for "essentially the same items"
		2880	Combine separate size labels on women's Air Force pantsuit.	a) rejected by gov. b) not implemented c) none of the future contracts were for "essentially the same items"

Contact #	Description	VECP No.	Description	ASBCA Findings
DLA-100-80-C-2972	Army men's all weather coat: ordered 125,240, delivered 25,903; contract terminated for default in late '81.	2181	Change interlining from fusible woven material to PELLON on men's Army all weather coat.	a) accepted by gov. b) not implemented, therefore no future contract royalties c)contract MIL-C-44030 was for "essentially the same items," however no suppliers used the suggestion within the available window, therefore no royalties are available

The Contracts Disputes Act (CDA) states the standard for this court's review of decisions from agency contract appeals boards as follows:

> [T]he decision of the agency board on any question of law shall not be final or conclusive, but the decision on any question of fact shall be final and conclusive and shall not be set aside unless the decision is fraudulent, or arbitrary, or capricious, or so grossly erroneous as to necessarily imply bad faith, or if such decision is not supported by substantial evidence.

41 U.S.C. § 609(b) (1988); See Federal Data Corp. v. United States, 911 F.2d 699, 702 (Fed. Cir. 1990).

Although MBOC enumerates sixteen issues on appeal, we find it necessary to address only those issues that are dispositive.

In its opinion, the board thoroughly evaluated the legal and factual basis for its determinations, which provide several alternative grounds for nonallowance of all the VECPs at issue.

All three contracts at issue include the same VEI clause. Its pertinent language is as follows:

> If the VECP accepted under this contract is used on future purchases of essentially the same items by the purchasing office, or its successor, the Contractor shall share in the savings . . . . (emphasis added).

From the above language, it is clear that the VECP must be accepted under the contract for allowance of royalties thereunder. As noted in the table above, the board found that three of the VECPs had been rejected by the agency, Nos. 1280, 2880, and 3380. MBOC, however, asserts that VECP Nos. 1280, 2181, 2880, and 3380 were "constructively accepted" by the agency when it allegedly implemented the "concepts" of these proposals in future contracts and therefore, it is entitled to future royalties. The government argues that MBOC's theory of constructive acceptance was properly rejected by the board.

The provisions of the VEI clause limit a contractor's recovery of cost savings arising from the agency's adoption of a VECP to instances where the VECP 1) is accepted by the agency, 2) is implemented on the instant contract, and 3) requires the issuance of a change to the contract. See John J. Kirlin v. United States, 827 F.2d 1538 (Fed. Cir. 1987). The board, in applying Kirlin, found that VECP Nos. 1280, 2880, and 3880 were specifically rejected by the agency and thus constructive acceptance was not a viable theory for entitlement. Subsequent to the board's findings, this court reaffirmed the board's application of the reasoning in Kirlin, which limits constructive acceptance to cases where the contractual relationship has not ended. M. Bianchi of California v. United States, 31 F.3d 1163, 1167 (Fed. Cir. 1994) ("If the government rejects the proposal in good faith and the contract terminates, the VECP terminates with the contract."). We affirm the board's decision,holding that the agency rejected VECP Nos. 3380, 1280, and 2880 without bad faith before termination, as supported by substantial evidence and based on proper application of the legal requirements for constructive acceptance. Although the board found that VECP No. 2181 had been accepted by the agency, it concluded that MBOC had not established entitlement to royalties on the basis discussed below.

MBOC's claim for future royalties also requires interpretation of the "essentially the same items" language in the VEI clause. MBOC argues that the "essentially the same items" language means the "components" in the military clothing, such as thread, interlining, and labels for use on any military items having such components, and not the particular garment that is the subject of the contract. This court, however, has recently interpreted this

same language from one of the contracts at issue here to mean "[t]he 'items' referred to in the contract are the ones manufactured and shipped pursuant to the contract." M. Bianchi of Cal. at 1168. The "essentially the same items" language refers to the items purchased under the contract and not to the component parts thereof. Because the board's interpretation in the instant appeal is consistent with this court's precedent, we affirm.

After careful review of the record, we hold that there is substantial evidence to support the board's findings that either none of the future contracts were for "essentially the same items" or, in the case of VECP No. 2181, no contractor ever implemented the suggestion. Therefore, MBOC is not entitled to royalties on any future contracts.

APPENDIX B

OTHER OPINIONS:

ARMED SERVICES BOARD OF CONTRACT APPEALS
ON SEPTEMBER 30, 1993

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --	)	
	)	
M. Bianchi of California	)	
	)	ASBCA Nos. 37395 37798 42243
	)	42244 42416
Under Contract Nos.	)	
DLA100-80-C-2290)		
DLA100-80-C-2972)		
DLA100-79-C-2894)		

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OPINION BY ADMINISTRATIVE JUDGE AXELMAN

After being awarded three contracts for the production of articles of clothing for the military services, appellant submitted five value engineering change proposals (VECP's) thereunder which it contends the Government accepted directly or constructively and for which it now seeks royalties of approximately $180 million, as follows:

ASBCA No.	VECP No.	Contract	Description of VECP
37395	1380	DLA100-80-C-2290	Change thread for buttonhole gimp on women's pantsuit coats from silk to polyester[1]
37798	1280	DLA100-80-C-2290	Change interlining of women's pantsuit coats from hairwool, rayon, or cotton to Pellon non-woven material
42243	2181	DLA100-80-C-2972	Change interlining of men's all weather coats from fusible woven material to Pellon fusible non-woven material
42244	3380	DLA100-79-C-2894	Change interlining of enlisted men's raincoats from fusible woven material to Pellon fusible non-woven material
42416	2880	DLA100-80-C-2290	Change from separate size and identification labels for women's pantsuit coats to one combined label

Quantum, as well as entitlement, is at issue in each of the appeals.

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[1] VECP 1380 also contained a proposed change to use Oncore or cotton thread for all body construction of the coats instead of polyester and silk thread (finding 23, infra). However, appellant declared at the hearing of these appeals and thereafter that it was no longer pursuing its claim with regard to that proposed change (tr. 1/17-18; app. posthearing br. at 79, 312).

FINDINGS OF FACT

I. The Contracts

A. Contract No. DLA100-7-C-2894

1. On 13 July 1979, the Defense Personnel Support Center (DPSC) of Philadelphia, Pennsylvania, Defense Logistics Agency (DLA), awarded appellant Contract No. DLA100-79-C-2894 for the manufacture and delivery of 43,000 Navy men's single-breasted polyester/cotton, poplin blue shade 3346 raincoats in accordance with military specification MIL-R-82290B(SA) for a unit price of $19.20 and a total contract price of $825,600 (R4, ASBCA No. 42244, tabs 1-4).

2. The contract also provided for an optional quantity of 21,500 units, which the Government ordered by Modification POOOO7 on 22 February 1980, at a unit price of $21.64, raising the contract quantity to 64,500 and increasing the contract price to $1,290,860 (ibid., tab 5).

3. Appellant delivered 43,952 units, but the remaining quantity of 20,548 units was terminated for default by Modification POOO11 dated 29 October 1981 (ibid.).

B. Contract No. DLA100-80-C-2290

4. On 7 November 1979, DPSC awarded appellant Contract No. DLA100-80-C-2290 for the manufacture and delivery of 26,250 polyester/ wool, tropical 10-ounce, blue shade 1578 Air Force women's pantsuit coats in accordance with Purchase Description ENEU 78-7 (subsequently superseded by MIL-C-87160) for a unit price of $34.37 and a total contract price of $902,212.50 (R4, ASBCA No. 37395, tab 1). The contract stated that it was a production test procurement for the purpose of determining whether the item described in ENEU 78-7 "can be manufactured in quantity production in accordance with accepted production practices" (ibid., tab 3 at 63; tr. 1/89).

5. Appellant delivered 25,903 units which the Government paid for and regarded as contract completion on 9 December 1980 (tr. 9/62-63; exh. G-193).

C. Contract No. DLA100-80-C-2972

6. On 23 June 1980, DPSC awarded appellant Contract No. DLA100-80-C-2972 for the manufacture and delivery of 125,240 Army men's black cotton and polyester poplin cloth all weather coats with removable liners at a unit price of $31.92 and a total contract price of $3,997,366.40. The coats were to be manufactured in accordance with Limited Purchase Description 12-77A (DES 12-77A) dated 1 November 1978 (subsequently replaced by MIL-C-44030, dated 24 July 1980) using patterns dated 21 September 1979 issued by the United States Army Natick Research and Development Laboratory (Natick) and were to be delivered between 4 January and 3 June 1981 (R4, ASBCA No. 42243, tabs 3, 5; tr. 1/156).

7. Appellant delivered 38,146 coats under the contract, and the remaining 87,094 were terminated for default in late 1981 (R4, ASBCA No. 42243, tab 6).

D. Value Engineering Incentive Clause

8. All three of appellant's contracts contained the following value engineering incentive clause (R4, ASBCA No. 37395, tab 4; R4, ASBCA No. 42243, tab 1; R4, ASBCA No. 42244, tab 2):

JO9 VALUE ENGINEERING INCENTIVE (DPSC 1978 Jan)

(a) Application. This clause applies to a Contractor developed and documented Value Engineering Change Proposal (VECP) which:

(i) requires a change to this contract to implement the VECP, and

(ii) reduces the overall costs to the cognizant Military Department without impairing essential functions of characteristics, provided that it is not based:

(A) solely on a change in deliverable end item quantities, or

(B) a change in R&D end item or test quantities due solely to results of previous testing under this contract, or

(C) solely on a change to the contract type.

(b) Documentation. As a minimum, the following information shall be submitted by the Contractor with each VECP.

(i) a description of the difference between the existing contract requirement and the proposed change, and the comparative advantages and disadvantages of each, justification when a function or characteristic of an item is being altered, and the effect of the change on the performance of the end item;

(ii) an analysis and itemization of the requirements of the contract which must be changed if the VECP is accepted and a recommendation as to how to make each change (e.g., a suggested specification revision):

(iii) a separate detailed cost estimate for both the existing contract requirement and the proposed change to provide an estimate of the reduction in costs, if any, that will result from acceptance of the VECP, taking into account the costs of development and implementation by the Contractor (including any amount attributable to subcontracts in accordance with paragraph (h) below);

(iv) a prediction of any effects the proposed change would have on collateral costs to the Military Department such as Government-furnished property costs, costs of related items, and costs of maintenance and operation.

(v) a statement of the time by which a contract modification accepting the VECP must be issued so as to obtain the maximum cost reduction, noting any effect on the contract completion time or delivery schedule, and

(vi) identification of any previous submission of the VECP, including the dates submitted, the agencies involved, the numbers of the Government contracts involved and the previous actions by the Government, if known.

(c) Submission. VECPs shall be submitted to the Procuring Contracting Officer (PCO). When the contract is administered by other than the purchasing office, a copy of the VECP shall be submitted simultaneously to the Administrative Contracting Officer (ACO). VECPs shall be processed expeditiously, however, the Government shall not be liable for any delay in acting upon any VECP submitted pursuant to this clause. The Contractor has the right to withdraw, in whole or in part, any VECP not accepted by the Government within the period specified in the VECP.

(d) Acceptance. The Contracting Officer may accept, in whole or in part, by contract modification either before or within a reasonable time after performance has been completed under this contract any VECP submitted pursuant to this clause. Until a contract modification applies a VECP to this contract, the Contractor shall remain obligated to perform in accordance with the terms of the existing contract. Contract modification made pursuant to this clause will so state. The decision of the Contracting Officer as to the acceptance of any VECP under this contract (including the decision as to which clause is

applicable to the proposal if this contract contains both a "Value Engineering Incentive" and a "Value Engineering Program Requirement" clause) shall be final and shall not be subject to the "Disputes" clause of this contract.

(e) Sharing. If a VECP submitted by the Contractor pursuant to this clause is accepted, the Contractor shall share in savings realized by the Government in accordance with the following provisions:

(1) Instant Contract.

(i) Definitions:

(A) Instant contract savings to the Contractor (ICS) is the unit cost reduction times the number of units affected in the instant contract. The proposed unit cost reduction includes estimated allowable Contractor development and implementation costs (CC). The Contractor's development and implementation costs include any subcontractor development and implementation costs and subcontractor incentive payments (see (h) below). For purposes of this clause, Contractor development costs are those costs incurred after the Contractor has identified a specific VE project and prior to acceptance by the Government.

(B) Government Costs (GC) are those DOD costs which directly result from development and implementation of the VECP, such as test and evaluation of the VECP, and any increased cost in DoD operations, maintenance, and logistics support.

* * *

(2) Concurrent Contracts.

(i) If the VECP accepted under this contract is also used on concurrent contracts of the purchasing office for essentially the same items, the Contractor shall be paid a share of any savings as calculated in (ii) below.

(ii) Calculations

(A) Determine the reduction in the price of each concurrent contract(s) as a result of incorporating the VECP.

(B) Subtract from the total amount in (A) any Government costs (GC) not yet offset (if GC was greater than ICS) in (e) (1) (ii) (C) or (D) above, and any increase in the instant contract price, i.e., if ICS was negative in (e) (1) (ii) (D), if the resulting number is positive, multiply it by 50% (25% if this is a VEPRC). Add this amount to the instant contract price.

(3) Future Contracts.

(i) Definition. The term unit cost reduction for future contract sharing shall be the unit cost reduction under this instant contract without deducting any cost of development or impletion [sic].

(ii) If the VECP accepted under this contract is used on future purchases of essentially the same item by the purchasing office, or its successor, the Contractor shall share in the savings on all affected end items scheduled for delivery not later than 3 years after acceptance of the first item incorporating the VECP, or until the originally scheduled delivery date of the last affected end item under the instant contract, whichever is later. When sharing on future contracts is expected, the Contractor shall be responsible for the following:

(A) Maintaining records adequate to support identification of the first delivered unit to which the VECP applies. These records are considered an integral part of contract documentation and shall be maintained for a period of three years after final payment on the contract under which the VECP was accepted.

(B) Annotating the DD-250, Material Inspection and Receiving Report, which applies to the initial unit covered by the VECP with the following statement:

"This is the initial unit delivered which incorporates VECP NO._____, Contract Modification No._____, dated _____."

(iii) Calculations. At the time each eligible future contract is awarded:

(A) Determine the number of units scheduled to be delivered prior to expiration of the Contractor sharing period determined in (ii) above. Multiply this by the unit cost reduction as defined in (e) (3) (1).

(B) Subtract from the total amount in (A) any Government costs or instant contract increases not yet offset in (e) (1) (ii) (C) or (D), or in (e) (2) (ii) (B), or in other contracts awarded since acceptance of the VECP. If the resulting number is positive multiply it by 50% (25% if this is a VEPRC) and add the result to the instant contract price.

(f) Payment. The Contractor's concurrent and future contract shares should be paid upon modification of concurrent contracts or future contract award, or within six (6) month thereafter. However, any such payments are subject to the condition that to the extent the Government does not receive delivery and accept all items

on which the share is paid, the Contractor shall reimburse the Government the proportionate share of the payments. If this clause is modified to provide for lump sum payments, such payments shall be made upon modification of the instant contract.

II. Appellant's Value Engineering Proposals (VECP's)

A. VECP 1280 (ASBCA No. 37798)

9. In a letter to DPSC dated 3 December 1979 (R4, ASBCA No. 37798, tab 6), appellant submitted several VECP's under Contract 2290, including the following proposal which the Government subsequently designated as VECP 1280 (ibid., tab 10):

1. Change From:

MIL-C-297F Cloth Interlining, Cotton Wrap and Spun Hairwool or Rayon Filling 12-1-79; $4.50 per yard 72" wide for Coat Fronts.

Change To:

Pellon Corp. fusible [sic] #3633, Color White, 45" wide at $.60 per yard.

Hair-Wool .286 yards per garment
72 x 36 equals 2592 square inches
Cost per square inch = .001736
658 square inch x .001736
= $1.14 per coat.

Pellon 45" x 36" long = 1620 square inches.
Cost per square inch = .000373
658 square inch x .000373 =
$.25 per coat.

Savings of $.89 per coat

10. An interlining is a piece of fabric that is sewn or fused between two other layers of fabric in parts of a garment, such as collars, cuffs, and pocket flaps, to give them body and stiffen them (tr. 5/187-88, 8/52).

11. Garment interlining material is either woven -- that is, resulting from the weaving of yarns vertically and horizontally on a loom like the hairwool

prescribed in Contract 2290 -- or non-woven -- that is, resulting from the pressing together of fibers with some sort of resin or by heat to cause them to bond into a papery type configuration like the Pellon Corp. #3633 material proposed by appellant (tr. 1/23, 82, 131-32, 141-43, 156-57, 5/188, 6/83-84).

12. Both woven and non-woven interlinings can be sewn or fused into a garment (tr. 1/134, 5/188). A fabric like Pellon #3633, is fusible when an adhesive is applied to it and is joined to other material by a process of time, temperature, and pressure which melts the adhesive (tr. 3/17, 5/189-90, 8/28-29).

13. Non-woven fusibles were developed by Freudenberg, the parent company of Pellon Corp., in Germany in or before the 1960's and became generally accepted in the garment industry by the mid-1980's (tr. 3/64). DPSC began testing fusibles in the late 1960's to determine how they could be used in military clothing (tr. 6/133); and the Army Research and Development Center at Natick, Massachusetts, engaged in a continuous research, development, and experimentation program concerning the use of fusible fabrics for components of garments, including interlinings, from 1971 to 1983 and thereafter (tr. 5/170, 175-76, 193-94, 6/5-6, 16-17, 93-96, 136, 138, 192-200, 7/49, 9/115-21; exh. G-139, -143). All of the military services participated in the Natick program, including the Marine Corps (tr. 2/58, 6/13, 16-18, 133-34, 7/49, 116) which wrote the MIL-C-29365 (MC) specification, entitled "CLOTH, NONWOVEN: INTERLINING, FUSIBLE, NYLON AND POLYESTER, POLYAMID," around a Pellon product in February 1978 (exh. G-116, -139; tr. 6/19, 35); and the military departments were fusing interlinings on approximately 15 items such as dress shirts, raincoats, service caps, and optional PX-type uniform coats in the mid to late 1970's (tr. 5/199-200; exh. G-125). Although the Government had tested 250 uniform coats in 1975-76 to determine the feasibility of fusible interlinings therein (tr. 6/5-6, 21, 133-34; exh. G-128) and had met with Pellon personnel at its factory in New England in the mid-1970's (tr. 6/17), it was not convinced in late 1979 that the desired quality of dress coats could be maintained with fusible interlinings (tr. 5/198-99, 6/57, 94-95). As stated by Mr. Bruce Snigger of the Fabric and Fabric Technology Division of Natick, in a 14 January 1980 memorandum to the chief of that division (exh. G-128):

> 2. A meeting was held on 7 December 1979 with Mr. D. Cerow, AUPO, to review the present status of the use of fusible interlinings and discuss where new uses can be introduced as presented in reference 1. Present from F&FT Branch, TR&ED were B. Snigger, E. Frederick, and R. Roth.

3. From the items identified in reference 1 as potential candidates for fusibles, it was agreed that the items listed in the attached table should be investigated and priorities were assigned as indicated.

4. The following comments are made concerning the categories selected for investigation:

a. Coats (items 1-3) - A wear test was performed in 1975/1976 with 250 fused polyester/wool coats. Although 68 percent of the test subjects reporting to NARADCOM indicated preference of the fused coats, some of the test items exhibited delamination of fused areas. The number of faulty coats generated a reluctance to introduce fusibles into dress items at that time. However, with the growing popularity in commercial items, and with the experience gained in-house and by outside contractors, a program has been initiated to evaluate improved fusibles in 25 men's coats in a small scale, closely monitored wear test which could include Army Uniform Board personnel. The coats will be made under "ideal" conditions (temperature, pressure and dwell time) with the fusing being done in the fusible supplier's laboratory. Crown Textile Co. has offered to furnish the fusibles and to assist in the fabrication of the coats.

b. Shirts and Overblouses (items 4-7) - The question was raised as to whether fusing of the flaps would magnify the puckering of the pocket stitching because of the flaps' relative smoothness. Approximately six (6) shirts will be made with fused collars, cuffs, flaps and shoulder loops to determine what aesthetic differences result before and after laundering.

c. Raincoats (items 8-10) - A document modification will be sent through AUPO to EPMO which will implement the fusing of raincoat collar stands as an alternate to the sewn-in marquisette. Fusing of the raincoat front with a suitable nonwoven fabric was also determined to be worthy of investigation. Sample coats will tentatively be made up at the Pellon Corporation Studio in New York and evaluated.

d. Women's Uniforms (items 11 & 12) - These items are scheduled to be phased out. AUPO has indicated that changes to these items would not be feasible since they could be out of the system before any modifications were implemented.

e. Coat, Men's, Woven Twill, Textured Polyester, AG 434 - UQC S-2-75 (item 13) - Since this item already utilizes fusible interlinings, a document change is being prepared for the UQC Office through AUPO to include fusing of the cuff wigans. This will be completed in January 1980.

5. Total funding over a two year period should be approximately $60,000. Action is being taken to transfer funds from AUPO to establish a TR&ED task.

14. Delamination is the separation of a fusible interlining from the fabric to which it is fused (tr. 1/131, 3/17, 43-44, 8/27).

15. At the time appellant submitted VECP 1280, it was aware that the Marine Corps had prescribed fusible, non-woven interlinings in MIL-C-29365 (MC) in 1978 (tr. 2/58). Appellant itself had had no prior experience with Pellon non-woven fabrics (tr. 2/114, 126).

16. By letter dated 28 February 1980, while the Government was evaluating VECP 1280 (R4, ASBCA No. 37798, tabs 8-11), appellant proposed the following Pellon products for the Government's consideration as "additional alternate" products to be used for interlinings on the Air Force women's pantsuit coats "for this procurement and all like procurements" (ibid., tab 12):

Pellon #SG413 36" Non-woven Fusible $1.09 1/2 per yard White
Pellon #SG413 36" Non-woven Fusible $1.16 1/2 per yard Black

(or, a lighter version)

Pellon #SG313 36" Non-woven Fusible $0.85 per yard White
Pellon #SG313 36" Non-woven Fusible $0.91 per yard Grey

17. In a letter dated 12 March 1980 (ibid., tab 14), appellant informed DPSC:

Cost estimated for the difference between hairwool and fusible interlining, as referenced in letter to DPSC dated 03Dec79, is incorrect. Depending on the type fusible interlining used, the savings is not $.89 but, from $1.36 for SG413 to $1.62 with Pellon #3633, SG313 savings would be $1.49.

Estimated labor savings by fusing are as follows.

Labor cost deleted

Hand Operations

A. Operation 4 (E)	Press undercollar	.046
B. Operation 4 (T)3	Baste collar 1/4" from edge to edge	.092
C. Operation 1 (A)	Baste interlining to front	.092
D. Operation 14(A)	Press fronts	.092
E. Operation 14(B)	Trim front interlining	.092
F. Operation 21(C)	Baste diagonal rows across lapels	.198

Sewing Operations

A. Operation 4 (A)	Blindstitch collar lining	.055
B. Operation 4 (H)	Stitch top and side edges of collar	.055
C. Operation 13(A)	Blindstitch 6 rows on lapel	.11
D. Operation 14(DD)	Stitch interlining from armhole to shoulder seam	.11
E. Operation 21(F)	Blindstitch back of front facing to interlining	.22
F. Operation 27(C)	Sew shoulder loop interlining to edge	.11

Labor cost added

Fusing of parts .20

Total labor savings are: Deleted operations	$1.272
Minus added cost	.22
Savings	$1.052

18. After evaluation by DPSC and the Air Force specification preparing activity and in accordance with their recommendation (ibid., tabs 13, 16-18), the contracting officer, by letter dated 18 April 1980, disapproved VECP 1280, stating (ibid., tab 19):

VECP 1280 - Proposal to use Pellon fusible in lieu of cotton warp and spun haircloth or rayon filling interlining material is not approved. We concur in the concept of using fusible interlining materials wherever applicable. However, one of the problems to be resolved before any action can be taken is to have test methods that yield reproducible data on which requirements can be based. Also, compatibility of the Pellon material and the base cloth to which it will be fused must first be determined. Detailed manufacturing procedures to insure control of time, temperature, and pressure during the fusing operation is of primary importance.

19. On 13 and 16 June 1980, appellant resubmitted VECP 1280, proposing respectively that Pellon #3633 and Pellon #SG413 be used in the manufacture of the pantsuit coats instead of hairwool or hair-rayon, and further stating that the proposal contemplated a reduction in cost on all like garments as well as the contract item (ibid., tabs 20, 21; tr. 1/126-27).

20. The Government took no action on the resubmitted VECP, and appellant, through counsel, submitted a claim concerning VECP 1280, in the amount of $1,023,999.86, on 4 August 1988 (exh. A-1165).

21. On 17 October 1988, the appeal in ASBCA No. 37798 was initiated by appellant after failure of the contracting officer to issue a final decision on its claim.

B. VECP 1380 (ASBCA No. 37395)

22. Appellant's 3 December 1979 letter to DPSC (finding 9) also contained the following proposal under Contract 2290 which the Government subsequently designated as VECP 1380 (R4, ASBCA No. 37395, tabs 6, 7):

2. Change From:

V-T-301D Thread Silk 4/22/71 AM, 2 - 4-19-73 - $50.60
1750 yards per pound/Omit Completely.

Change To:

V-T-285 D Polyester -- 1750 yards $.65

Savings : $49.95 per pound

23. On 25 January 1980, appellant amended its proposal in the following letter to DPSC (ibid., tab 8):

> Please refer to our Valued [sic] Engineering
> Recommendations dated 03 December 1979, Change #2.
>
> The information given to us by Gudebrod, Inc. regarding 1750 yards per pound, silk thread, is incorrect. We recommend the following change which will reflect the pounds as being accurate according to the management of Gudebrod, Inc.:
>
> Change From:
>
> V-T-301D Thread Silk 4/22/71 AM 2, 4-19-73 $50.60 per pound
>
> Yield as follows: Type A 15,200 per pound
> Type B 12,480 per pound
> Type C 9,920 yards per pound
> (Gimp)
>
> Change To:
>
> Threads, Inc.
>
> Oncore 50 MIL-T-43548 7.02 per pound
> (To be used for all body construction including topstitching)
>
> Yield as follows: 11,000 yards per pound
>
> Cotton A-3 V-T-276 6.30 per pound
> (To be used for button hole sewing)
>
> Yield as follows: 9,600 per pound
>
> Cotton #8 V-T-280 5.86 per pound
> (Gimp to be used for button holes)
>
> Yield as follows: 11,000 yards per pound
>
> Omit V-T-295D Thread Nylon 2-33-77 $28.50 per pound.
> This can be utilized with Threads, Inc., as listed above:

Silk:	A	$50.60	Threads, Inc.	$ 7.02
	B	50.60	Threads, Inc.	6.30
	C	50.60	Threads, Inc.	5.86
		$151.80		$19.18

Savings : $132.62 per three (3) pounds

24. After evaluation, the Government disapproved VECP 1380, except the proposal to use V-T 280 cotton thread for button hole gimps (reinforcements) which it accepted, in Modification POOOO6, dated 20 May 1980, as an alternative to the ENEU 78-7 requirement for silk thread for gimps (tr. 1/98, 9/54-55; R4, ASBCA No. 37395, tabs 9, 10).

25. The allowance of V-T cotton thread as an alternative material for gimps was confirmed in Modification POOO10 which was executed by appellant on 30 October 1980 and by the contracting officer on 3 November 1980 and contained the following provisions (ibid., tab 11):

> 1. Pursuant to Clause JO9 entitled Value Engineering Incentive Clause the following changes are made to the specification requirements:
>
> VECP #1380 - para. 3.1.15 Gimp - At the end of the paragraph add "or the Gimp may be cotton type II, size 8 of V-T-280."
>
> 2. The contractor and the Government hereby agree that savings as a result of VECP #1380 will be $.0395 per unit for future contracts utilizing this change.
>
> 3. It is agreed that the contractor is entitled to 50% of the unit savings or $.01975 per unit for all items utilizing this change during the royalty period.

26. Appellant did not use the alternative V-T-280 cotton thread for gimps on the 25,903 units which it delivered under Contract 2290 between 24 September and 9 December 1980 (exh. A-1074, G-194; finding 5; app. posthearing br. at 78).

27. There were no concurrent contracts for the item which was the subject of Contract 2290, and no other contractors which manufactured women's Air Force pantsuit coats for the Government after appellant's submission of VECP 1380 elected to utilize the alternative V-T-280 cotton thread for gimps (tr. 4/ 26-27, 35, 9/57-58).

28. Appellant received no royalties or other compensation for VECP 1380 (tr. 1/120).

29. In a letter dated 27 May 1988, appellant filed a claim in this matter, through counsel, in the amount of $1,036.88 for instant contract savings and indicated that the claim would be supplemented as it obtained further information concerning the implementation of VECP 1380 by the Government (exh. A-1166).

30. Appellant subsequently appealed from a failure of the contracting officer to issue a final decision on VECP 1380.

C. VECP 2181 (ASBCA No. 42243)

31. By letter dated 31 October 1980 (R4, ASBCA No. 42243, tab 7), appellant submitted to DPSC the following VECP under Contract 2972, which was subsequently designated as VECP 2181 (ibid., tabs 8, 9):

> Regarding clause J O9 Value Engineering, MBOC recommends the following change:
>
> Change From
>
> > 100 percent cotton plain weave cloth which has a uniformly distributed dot system of a polyvinyl chloride/polyvinyl acetate type fusible adhesive applied to one side. (Per paragraph 3.2.9.1 of LP/P DES 12-77A)
>
> Change To
>
> > Pellon product SG413 (#8325) non-woven fusible interlining.
> >
> > Note: Pellon Corporation has notified MBOC that # SG413 and #8325 applies to the same product. A decision is being finalized by Pellon Corporation management as to which number will pertain to the product.
> >
> > Please refer to DLA100-79-C-2894 correspondence on VECP #3380 and DLA100-80-C-2290 correspondence on VECP #1380 from DLA which contains all current data and testing accomplished by the Department of Defense.

Cost savings can only be determined upon future evaluating by audit. MBOC will supply this information upon request in compliance [sic] with Clause J O9.

32. After technical review and evaluation of appellant's proposal, the Army Natick Research and Development Laboratories determined that the interlining material proposed in VECP 2181 was acceptable as an alternative to the interlining material prescribed in the contract, and it recommended the approval of that VECP (ibid., tab 8; tr. 6/24, 43, 51).

33. Natick's recommendation was adopted by the Government in unilateral Modification POOOO5 to the contract dated 31 March 1981, which provided (R4, ASBCA No. 42243, tab 6):

5. In addition, VECP #2181 has also been approved. The following changes are incorporated into the contract to MIL-C-C-44030:

CHANGES TO MIL-C-44030, 24 July 1980

a. Page 1, paragraph 2.1, under Military Specifications, add: "MIL-C-29365 - Cloth, Nonwoven, Interlining, Fusible, Nylon and Polyester, Polyamid."

b. Page 4, paragraph 3.2.9.1, at the end of the paragraph add: "As an alternative a nonwoven fusible fabric conforming to class 3 material of MIL-C-29365 may be used as a fusible interlining. Testing for the nonwoven fusible shall be as specified in MIL-C-29365 (The woven fusible requirements contained herein for colorfastness, 3.2.9.3; fusing conditions, 3.2.9.4; bond strength, 3.2.9.5, and shrinkage, 3.2.9.6, shall not apply).

6. The contractor shall be entitled to 50% of the unit savings or [sic] any unit incorporating VECP #2181. Unit savings has not yet been determined for this VECP; modification will be issued to definitize the savings at a later date.

7. Contractor is obligated to annotate the DD Form 250 which applies to the initial unit covered by the VECP #2181.

34. A cost analysis of the proposed change, conducted by DPSC's Directorate of Manufacturing in late March 1981 disclosed that the change in interlining material proposed in VECP 2181 would effect neither an increase nor a decrease in production costs (tr. 5/81, 6/152-56; exh. G-140).

35. VECP 2181 was not implemented under Contract 2972, and appellant received no payments for VECP 2181 (tr. 1/162; exh. A-1042; app. posthearing br. at 289-90, 384, 443-44).

36. Appellant submitted its present claim in this matter, for an unspecified amount, on 3 August 1990 (R4, ASBCA No. 42243, tab 12) and subsequently appealed from a failure of the contracting officer to issue a final decision thereon (ibid., tab 14).

D. VECP 2880 (ASBCA No. 42416)

37. On 22 January 1980, appellant submitted to DPSC a VECP, subsequently designated as VECP 2880, under Contract 2290, proposing that two labels prescribed in the contract for attachment to the pantsuit coats, one for size and one for contractor and personnel identification (tr. 1/165, 199, 5/114-15), be combined as suggested in a 10 December 1979 letter from its subcontractor, Star Printing Company, which stated (R4, ASBCA No. 42416, tabs 6, 7, 10):

> We enclose herewith 100 each of the labels required for your contract 2290 and can quote as follows for the labels as submitted:
>
> | | | |
> |---|---|---|
> | 1. 27,000 | 3" x 3" Type I Classes 1 & 10 Labels | @ $16.50 M |
> | 2. 27,000 | Asst. 1 1/2 x 1 1/4 Type I Class 2 | @ $ 5.25 M |
> | | labels plus 31 size changes | @ $1.50 each |
> | 27,000 | Asst. 3 1/2 x 1 5/8 "paper" bag | |
> | | insert" labels | @ $ 4.50 M |
> | | plus 31 size changes | @ $1.50 each |
>
> Maury, if it is possible for you to combine label #1 and label #2 with 1/4" sew in on four sides only, combination Type I Classes 1, 2 and 10 label, the price for 27,000 assorted 2 5/8" x 2 3/8" labels would be at $12.50 per thousand plus 31 size changes at $1.50 each. These labels would take the place of both 3" x 3" and the 1 1/2" x 1 1/4" label if you are able to convince the inspector that there is a cost saving by combining the two labels.
>
> We will hold up processing the balance of your order and would appreciate hearing form you at your earliest convenience how you want to handle the balance of this order.

38. After consideration and evaluation of VECP 2880, the Air Force Clothing and Textile Office, of Philadelphia, Pennsylvania, the specification preparing activity, reported that it did not concur in the proposal because the "size label is required to be placed so that it will be visible for both storage & issue purposes" (ibid., tab 11).

39. By letter dated 2 April 1980 (ibid., tab 12), the contracting officer informed appellant that VECP 2880 was not adopted for the reason stated by the specification preparing activity in its report.

40. VECP 2880 was not implemented on the subject contract, and appellant received no payment therefor (tr. 1/168, 171).

41. Appellant submitted its present claim, in an unspecified amount, for alleged constructive acceptance of VECP 2880 on 30 October 1990 and revised the claim on 26 November 1990 to an amount less than $50,000; and it has appealed from the failure of the contracting officer to issue a final decision thereon.

E. VECP 3380 (ASBCA No. 42244)

42. On 28 February 1980, appellant sent the following VECP to DPSC under Contract 2894, which was subsequently designated as VECP 3880 (R4, ASBCA No. 42244, tabs 6, 7).

MBOC recommends the following change:

Change From

Samuel Habers, QST, style #961/Facemate style #2320
Fusible Interlining Woven. $1.05

Change to

Pellon Corp., 36 inch SG413 Fusible $1.09 1/2
White
Non-Woven 1.16 1/2
Black

This product has been proven to be highly successful in raincoats and all like garments for all outer-wear use.

This product is especially good for garments that are exposed to rain or heavy water use. We have found that when the outer-shell becomes saturated, the SG413 does not defuse itself from the base fabric as easily as woven fusible facings. Its porus [sic] construction factors and its fusible properties are of a higher quality than woven products we have experienced in the past.

43. By letter to DPSC dated 7 April 1980, appellant amended VECP 3380 after learning that the Government intended to revise the provisions of MIL-R-82290B to replace the woven fusible interlinings with sewn-in hairwool woven cloth interlinings meeting the requirements of MIL-C-297, as follows (ibid., tabs 8, 9, 15):

> . . . it has been brought to MBOC's attention that Woven Fusibles would be changed to a loose coat front, flap, collar and stand interlining.
>
> MBOC received a bid (DLA100-80-B-0542) that indicates MIL-C-297F Cloth, Interlining Cotton Warp and Hairwool. This product is $4.50 per yard (72 inches wide). The Hairwool will require hand trimming; added cost as follows:
>
> | | | |
> |---|---|---|
> | 1 Collar | | .025 |
> | 1 Stand | | .025 |
> | 2 Flaps | @.02 each | .04 |
> | 2 Coat Fronts | @.06 each | .12 |
>
> A total cost for hand trimming of .21c.
>
> Machine setting time cost will increase as follows:
>
> | | | |
> |---|---|---|
> | 1 Collar | | .015 |
> | 1 Stand | | .015 |
> | 2 Flaps | @.015 each | .03 |
> | 2 Coat Fronts | @.03 each | .06 |
>
> A total increase cost of .12c per coat.
>
> The above does not reflect arm flaps or epaulets. A cost increase can not be evaluated.

The percentage of shrinkage is flexible [sic] in the MIL-C-297F Cloth Interlining Cotton Warp and Hairwool. Patterns must be graded with an over-allowance to accommodate. This over-allowance can only be determined by the Pattern Maker and Engineering Department in the Government. Additional material of course will be necessary for the Hairwool Interlining.

The fabric cost difference is as follows:

a) Facemate Woven Style #2320 45 inches wide $1.06 per yard
b) MIL-C-297F Cloth Hairwool/Cotton Warp
72 inches wide 4.50 per yard
c) MBOC recommends:
Pellon Corp SG 413 Non-woven, White 1.09 per yard
" " " " Black 1.16 1/2 per yard
(or) Pellon Corp SG 313 Non-woven, White .85 per yard
" " " Grey 36 inches wide .91 per yard

The selection between SG 413 and SG 313 will determine the savings in this cost area.

Pellon SG 413 is heavier than SG 313. It is MBOC's opinion that SG 313 will accomplish an end product of quality finish and desired stiffness. It is also MBOC's position that bubbling will not occur because of the open weave construction of either SG 413 or SG 313. MBOC strongly suggests an indepth laboratory test on this product for all weather garments.

MBOC has made contact with the Pellon Corp to assume proper fusing. All fusing can be arranged if contractors do not have the proper fusing equipment.

This Valued Engineering Recommendation is for all like garments.

44. VECP 3380 was considered by the Navy Clothing and Textile Research Facility at Natick, Massachusetts, whose evaluation and recommendation (ibid., tab 9) were adopted by the contracting officer and reflected in the latter's 14 October 1980 letter to appellant, as follows (ibid., tab 10).

Your Value Engineering Change Proposal 3380, recommending a nonwoven fusible interlining for man's raincoat under MIL-R-82290(SA) has been evaluated and final approval is still pending.

Currently, the Navy, with other military services, DCAS and DPSC are conducting a Fusible Interlining Development Program. The intent of this program is to develop a Government wide fool proof method of specifying fusibles, their requirements, application and testing in specifications.

Since problems occurred with fusibles in raincoats in the past and since a program is currently underway, the Navy is withholding any adoption of fusible into the subject specification until the fusible interlining committee can agree on the adoption of specification verbage [sic] that is considered to be the best method of selecting, applying and testing the fusible.

In view of the above, your VECP cannot be adopted at this time. We will inform you periodically regarding the progress of the fusible program.

45. By letter dated 15 October 1980 (ibid., tab 11), appellant informed the contracting officer, with reference to VECP's 3380 and 1280:

We have been advised by the Pellon Company that the progress for all branches of service has been verbally accepted and it is a matter of the time of processing the proper paper work to formalize the governments [sic] acceptance of the changes in the above reference [sic] VECP numbers.

I would also like to advise you that for bookkeeping purposes, the numbers only are being changed by the Pellon Company to an 8,000 number series. SG313 is now 8313 and SG413 is now 8325. The fabric itself has not changed.

The Value Engineering, as previously stated, is to cover all branches of service and all applicable garments.

Cost calculation of saving can only be determined upon audit and evaluation in accordance with Value Engineering Clause [sic] JO9 DPSC Jan.

46. The specification for the Navy enlisted man's raincoat, which was the subject of Contract 2894, was never changed to include non-woven fusible interlinings or other components, and the raincoat was "phased out" as an authorized item starting in May 1985, and replaced by an all weather coat (ibid., tabs 13, 15, 17; tr. 7/160).

47. VECP 3380 was not implemented on the subject contract, and appellant received no payment therefor (tr. 1/149-50, 153).

48. Appellant submitted its present claim, in an unspecified amount, concerning VECP 3380 on 3 August 1990 (R4, ASBCA No. 42244, tab 12) and has appealed from a failure of the contracting officer to render a final decision thereon (ibid., tab 14).

III. Appellant's Claims

A. VECP's 1280, 2181, and 3380

49. Appellant contends that its suggested changes to non-woven fusible interlinings in VECP's 1280, 2181, and 3380 were constructively accepted by the Government when the latter implemented the concepts in those proposed changes on subsequent specifications; that the Government confirmed the constructive acceptance of VECP's 1280 and 3380 when it accepted VECP 2181; that it had introduced the Government, through DPSC, to the non-woven fusible manufactured by Pellon Corp. or its functional equivalent; that it is entitled to royalties for future contracts of the Government for "essentially the same" items, which it defines, as it applies to VECP's 1280, 2181, and 3380, as "any item which contains (or would contain 'but for' MBOC's VECPs) an unsatisfactory interlining requirement that can be replaced with a nonwoven fusible, resulting in lower production or life-cycle costs, without a diminution of the changed item's essential functions or characteristics"; that it is also entitled to royalties for collateral savings which the Government realized as a consequence of its constructive acceptance of those VECP's; and that the Government acted in bad faith in denying that its VECP's, particularly VECP 2181, resulted in contractor savings (app. posthearing br. at 63-65, 310-12, 316-458).

50. Since the changes recommended in appellant's VECP's were not implemented under its contracts, appellant is claiming no instant contract savings therefor (ibid., at 289-90, 384, 443-44).

51. Nor is appellant claiming any royalties for concurrent contracts since it could find no information to show that its VECP's were used on any such contracts (tr. 4/44; exh. B of exh. A-1040, -1041, -1042).

52. In accordance with its definition of "essentially the same item," appellant seeks royalties for alleged Government savings on many contracts awarded by the Government embracing the following military specifications (exh. A-1, -1000 through -1042, -1094; tr. 1/136-37, 149-50, 159, 3/41; app. posthearing br., vol III):

MIL-SPEC	DESCRIPTION
B-29407	Belt for Man's All Weather Coat
B-29408	Belt for Woman's All Weather Coat
C-15507	Woman's Garrison Cap
C-24921	Woman's All Weather Coat With Removable Liner
C-43972	Woman's All Weather Coat, Black, With Removable Liner
C-44030	Man's All Weather Coat, Black, With Removable Liner
C-87110	Man's All Weather Coat, Black, With Convertible Collar and Removable Liner
C-87170	Woman's All Weather Coat, Black, With Removable Liner
C-87230	Flyer's Coveralls
J-88382	Man's Flyer Jacket, Summer
C-82189	Man's Full Dress Coat, Summer and Winter
J-83388	Flyer's Jacket, Cold Weather
J-29451	Man's Marine Corps Jacket, Intermediate Weight
R-24918	Man's Double-Breasted Raincoat, Coast Guard, With Removal Liner
R-24919	Woman's Raincoat, Coast Guard, With Removal Liner
R-43518	Man's Quarpel-Treated Double-Breasted Raincoat
S-21087	Woman's Skirt, Wool, Polyester Wool
S-29122	Woman's Dress Skirt
S-87053	Woman's Belted Skirt
S-87054	Woman's Belted Slacks
S-87055	Woman's Dress Shirt, White
C-24920	Man's All Weather Coat, With Epaulets, and Removable Liner
C-27438	Man's Service Coat

C-44048	Combat Coat, Camouflage Pattern
C-44211	Man's Coat, Tropical and Serge, Polyester Wool
C-44379	Woman's Combat Coat, Polyester Wool
C-87215	Woman's Air Force Garrison Cap
J-87250	Man's Light Weight Jacket, With Removable Liner
J-87251	Woman's Light Weight Jacket, With Removable Liner
J-29396/7	Woman's Dress Jacket, Scarlet
S-24948	Woman's Slacks
S-29394	Woman's Marine Corps Band Evening Dress Skirt
S-29429	Woman's Skirt
S-44039	Man's Long Sleeve Shirt, Polyester/Cotton, Army Green
S-44041	Man's Short Sleeve Shirt, Army Green
S-44090	Woman's Short Sleeve Shirt, Polyester/Cotton, Army Green
S-44093	Woman's Long Sleeve Shirt, Polyester/Cotton, Army Green
S-44290	Man's Hospital Duty Uniforms Smock
S-83234	Woman's Blue Skirt
S-82126	Woman's Marine Corps Dress Skirt
T-44047	Combat Trousers, Camouflage Pattern

53. Appellant selected the foregoing military specifications and the Government contracts referring to them after examination of the histories and specifications of several thousand contracts (tr. 1/99-100, 104-13). Employing consultants with expertise in engineering, computers, apparel manufacturing, methods-time-measurement with regard to clothing manufacture, and cost and pricing data (tr. 2/149-54, 3/9-15, 4/11-19, 23), appellant completed the formulation and quantification of its claims in late March 1992 in reports prepared by the Peter Elliott Accountancy Corporation (exh. A-1040, -1041, -1042; tr. 3/18-58, 105-61, 4/23--120) which contained cost figures for the following:

a. Appellant's estimate of labor and material savings by the Government on future contracts.

b. Indirect Expense savings.

c. Profit.

d. Extended life savings -- i.e., estimated savings on quantities that would have been scheduled for delivery but for implementation of the VECP's

e. Maintenance savings.

f. Interest, both before and after the filing of appellant's claims.

g. Collateral savings and interest thereon.

h. Escalation -- i.e., the adjustment of material costs to the midpoint period of performance (tr. 4/31-33).

i. Re-engineered costs for VECP 1280 reflecting an alternate royalty period of the highest three years of planned production because Contract 2290 was a production test contract (tr. 4/38-41).

54. The total amounts of appellant's claims for its three non-woven fusible interlining VECP's, as constructed by the Elliott Corporation, were (exh. A-1040, -1041, -1042):

VECP 1280	$68,629,052
VECP 2181	91,182,891
VECP 3380	17,013,187
	Total $176,825,130

B. VECP 1380

55. Appellant contends that its suggestion in VECP 1380 that cotton gimp be used for button hole sewing was implemented by the Government in future contracts for approximately 32 "essentially the same" items as that purchased under Contract 2290, defining "essentially the same item" as "any item which contained (or would have contained) buttonholes prior to MBOC's VECP" (app. posthearing br. at 76, 287, 415; exh A-1049 through -1074; tr/ 1/99, 118).

56. Appellant seeks no collateral or concurrent savings in its claim for this VECP (tr. 1/18; exh. A-1074).

57. Appellant does not seek any instant contract savings since "Contract DLA100-80-C-2290 was modified to incorporate VECP 1380, however, the change was not implemented on that contract" (exh. A-1074 at A2, p. 1; finding 26; tr. 3/74; app. posthearing br. at 78).

58. The future contracts for which appellant seeks royalties for VECP 1380 embraced the following military specifications (exh. A-1, -1049 through -1074; tr. 1/107-12):

MIL-SPEC	DESCRIPTION
T-44094	Trousers, Night Camouflage, Desert
C-24920	Man's All Weather Coat with Removable Liner
C-24921	Woman's All Weather Coat with Removal Liner
C-27438	Man's Service Coat
C-44101	Woman's Classic Design Coat, Polyester/Wool
C-44107	Ground Troops Parachutist's Helmet Cover
C-44111	Woman's Maternity Work Uniform Coat
C-44211	Man's Tropical Serge Coat, Army Green
C-44379	Woman's Classic Design Coat, Army Green
J-24949	Woman's White Jumper
J-87250	Man's Light Weight Jacket with Removable Liner
J-87251	Woman's Light Weight Jacket with Removable Liner
O-24905	Man's Coast Guard Reefer Overcoat
O-24906	Woman's Coast Guard Reefer Overcoat
O-24926	Enlisted Woman's Overcoat
R-24918	Man's Coast Guard Raincoat
R-24919	Woman's Coast Guard Raincoat with Removable Liner
S-29429	Woman's Skirt
S-44110	Woman's Maternity Work Uniform Skirt
S-87005	Woman's Coast Guard Dress Skirt
S-87169	Woman's Utility Durable Press Shirt
S-87171	Woman's Durable Press Utility Slacks
T-29452	Man's Polyester Wool Trousers
C-29391	Woman's Wool Gabardine Dress Ceremony Coat
C-29393	Woman's Marine Full Dress Coat
J-29396	Woman's Marine Band Full Dress Jacket
J-29397	Woman's Marine Band Full Dress Jacket
J-29451	Man's Intermediate Weight Jacket, Polyester Wool
O-29390	Woman's Wool Gabardine Overcoat
S-29392	Woman's Wool Gabardine Skirt
S-29394	Woman's Marine Band Evening Dress Skirt
S-29395	Woman's Musician Slacks
S-24902	Woman's Polyester and Cotton Slacks
T-44291	Man's Hospital Duty Uniform Trousers
V-29389	Man's Scarlet Dress Vest

59. Appellant selected the foregoing military specifications and the Government contracts referring to them and prepared its claim for VECP 1380 in the same manner and with the same elements as for VECP's 1280, 2181 and 3380 (finding 53; tr. 1/99-100, 104-15, 4/23-42, 45; exh A-1074), except that the Peter Elliott report for VECP 1380 contained no collateral savings or re-engineered costs (tr. 4/39; exh. A-1074).

C. VECP 2880

60. Appellant contends that VECP 2880, which suggested the combining of labels for pantsuit coats, was denied by the contracting officer "in bad faith and without a rational basis" (app. posthearing br. at 88) and that it was constructively accepted by the Government's utilizing the change in contracts involving the following 13 specifications for essentially the same item, which appellant defines as "any place that the Government is going to use the combination label" without restriction to any particular garment (ibid.; tr. 1/32, 168-71; exh. A-1, -1080 through -1092):

MIL-SPEC	DESCRIPTION
C-85700	Flyer's Summer Coveralls
T-44213	Physical Fitness Trunks
C-87230	Flyer's Cold Weather Coveralls
O-24905	Man's Coast Guard Reefer Overcoat
O-24906	Woman's Coast Guard Reefer Overcoat
P-44087	Night Camouflage Desert Parka
P-44188	Extended Cold Weather Camouflage Parka
S-29415	Wool Service Sweater
S-37951	Man's Medical Assistant Polyester/Cotton Smock
S-44092	Woman's Classic Design Polyester/Wool Slacks
S-44212	Hooded Physical Fitness Uniform Sweat Shirt
T=44094	Night Camouflage Desert Trousers
T-44189	Extended Cold Weather Camouflage Trousers

61. Appellant further contends that the first unit which incorporated VECP 2880 was delivered to the Government on 28 February 1984 and that therefore the royalty period for the VECP is from February 1984 to February 1987 (exh. G-308; app. posthearing br. at 89); that since Contract 2290 was a production test contract, with a low rate of production, a second, alternative royalty period, based on the highest 36 months of actual production, from April 1989 to April 1992, is applicable (ibid.); and that it is entitled to royalties for future contract savings totalling $250,575 (ibid. at vol III, attachment 1).

62. Appellant seeks no instant contract savings royalties since its proposed change was not implemented under Contract 2290 (exh. A-1093); tr. 1/168).

63. Nor does appellant seek any concurrent contract savings royalties or collateral savings costs (exh. A-1093).

64. Appellant prepared its claim for VECP 2880 in the same manner and with the same elements as for its other VECP's (findings 53, 59; exh. A-1093; tr. 4/63-67).

IV. Pertinent Regulations

A. Collateral Savings

65. Armed Services Procurement Regulation (ASPR) 1-1073.2 (1 July 1976), in effect at the time of award of the subject contracts, provided that the paragraph in the standard JO9 Value Engineering Incentive clause entitling a contractor to share in collateral savings "may be excluded from a contract or class of contracts when the HPA [Head of the Procuring Activity] determines that the cost of computing and tracking collateral savings will exceed benefits to be derived."

66. Pursuant to that regulation, the paragraph in the standard JO9 clause entitling a contractor to share in collateral savings was excluded from all of the contracts involved in these appeals (finding 8) as well as for subsequent DPSC contracts for the acquisition of clothing and textiles (tr. 9/103-07; exh. G-165, -166, -167, -171).

B. Profit

67. ASPR 1-1703.1 (d), in effect at the time of award of the subject contracts, provided:

On instant and future contracts the contractor's profit or fee shall be excluded when calculating the net savings.

C. Alternative Royalty Period

68. Appellant contends that because Contracts 2290 and 2894 were production test contracts, it is entitled to future contract royalties for the time period prescribed in Defense Acquisition Circular (DAC) #76-26, dated 15 December 1980, which was in effect prior to the actual acceptance of VECP's

1380 and 2181 and the constructive acceptance of VECP's 1280, 2880, and 3380, as an alternative to the royalty period specified in the JO9 clause of the contract (app. posthearing br. at 18). DAC #76-26 provided (exh. A-1146):

> (4) Concurrent and Future Contract Savings.
>
> a. . . . . If the instant contract is for low rate initial production or an earlier life-cycle phase, the future sharing period shall encompass scheduled deliveries, equal in number to the quantity required by the highest 36 consecutive months of planned production, based on the Five Year Defense Program (FYDP) or other planning documentation at the time the VECP is accepted.

V. Additional Findings and Conclusions

A. VECP's 1280, 2181, and 3380

69. In VECP 1280, appellant had proposed to change only the fronts of pantsuit coats and not other coat parts for which it seeks royalties (finding 9; tr. 6/140, 7/13, 9/22-23).

70. The fronts of women's pantsuit coats were never changed in military specifications to include non-woven fusible interlinings (tr. 6/139-40, 143-44, 147-48).

71. The change proposed in VECP 3380, from woven fusible interlining to Pellon non-woven fusible interlining, would not have produced any savings, but rather it would have increased the cost of the Navy enlisted man's polyester cotton raincoat since the proposed Pellon material cost ($1.095 per yard for white and $1.165 per yard for black) was greater that the cost of the woven material prescribed in the contract ($1.05 per yard) (finding 42; tr. 1/141, 146, 6/84-85, 156-58).

72. The raincoat which was the subject of Contract 2894 and VECP 3380 was phased out of the Government procurement system in 1985 (tr. 7/160).

73. The change in material proposed in VECP 2181, from woven to Pellon non-woven interlining in the Army man's polyester cotton all weather coat, which the Government accepted as an alternative (findings 32, 33), would have produced no cost savings since the cost of the Pellon material was the same as that for the interlining material prescribed in the contract (tr. 1/162, 5/81, 6/83, 86, 152, 155-56; exhs. G-140, -141).

74. Contrary to appellant's contention (finding 49), it did not introduce the Government to the non-woven fusible manufactured by appellant. Before appellant had submitted its VECP's concerning Pellon products or otherwise suggested their use by the Government, the Government had met with Pellon personnel at the latter's factory, had written a specification, MIL-C-29365, around a Pellon product, and fully considered Pellon's non-woven fusible interlinings as part of its continuous research, development, and experimentation program concerning the use of fusible fabrics for garment components for all of the military services (findings 13, 15).

75. Non-woven fusibles had not been sufficiently developed by late 1979 to eliminate the likelihood of delamination and shrinkage during manufacture, particularly during fusing, and subsequently during laundering and dry cleaning processes (tr. 5/198-201, 6/57, 94-95, 135-36, 7/99, 122, 8/35-37; finding 13).

76. In the 1980's, improvements in technology, particularly with regard to fusion machines and resin-based adhesives developed for the fusion process, led the Government, as well as the textile industry, to make more extensive use of non-woven fusibles in the fabrication of wearing apparel and other textile products (tr. 3/63-64, 71, 161, 5/198-202, 6/81-82, 145, 8/16-17, 43-46).

77. Four days before appellant had submitted VECP 2181, the Government had completed a study of a Pellon non-woven fusible and had begun to draft changes to military specifications for all weather coats, as indicated in the following memorandum for the record dated 27 October 1980 by Natick's fusing program project officer (tr. 6/23, 38; exh. G-151):

> 1. A study of Pellon Corporation Style 8325 has been completed by the Seams Engineering Laboratory. The nonwoven style is compatible with the water repellent treated fabric used in the men's, women's and Jr. ROTC all-weather coats. No delamination of any samples was found, and the fused fabrics look outstanding, in my opinion, after laundering or dry cleaning.
>
> 2. In view of the above, I am drafting the necessary changes to the all-weather coat specifications (MIL-R-87110, MIL-R-43972 and MIL-R-43962A) to allow the nonwoven as an alternate to the present (woven) fusible. This decision was based on our testing, Pellon test results and acceptance by the Marine Corps and commercial manufacturers. In addition, a minimal cost savings should result when the nonwoven is used.

78. On the record before us, we are convinced that none of the military specifications for which appellant seeks future contract royalties (finding 52) was changed because of appellant's VECP's 1280, 2181, and 3380 (tr. 6/158-71, 177-78, 183-84, 7/9-43, 8/24-30, 43-47, 50). In fact, those working on the fusible program and garment specifications at Natick in the 1980's had never even heard of appellant (tr. 8/46).

79. Nor are we persuaded that the Government realized any cost savings on any future contracts involving those military specifications because non-woven fusibles, as opposed to other materials, were prescribed therein (tr. 6/151-53, 155-58, 169-71, 194). In this regard, we deem it highly significant that appellant produced no cost records of any contractor under any of those contracts to disclose how its manufacturing costs were affected by its use of non-woven fusibles.

80. We further conclude, after examination of the military specifications upon which appellant bases its claims for future contract royalties (finding 52), that none of those specifications dealt with an item which was essentially the same as the Air Force woman's pantsuit coat prescribed in Contract 2290 with regard to design, construction, purposes, and functions, that none of those specifications dealt with an item which was essentially the same as the man's cotton and polyester poplin cloth all weather coat prescribed in Contract 2972 with regard to design, construction, purposes and functions, with the exception of MIL-C-44030; and that none of those specifications dealt with an item which was essentially the same as the Navy enlisted man's single-breasted raincoat prescribed in Contract 2894 with regard to design, construction, purposes, and functions (exh. A-1000 through -1042; tr. 2/101-03, 3/23, 5/196, 8/31-34). Most of those specifications, such as those for belts, caps, coveralls, skirts, slacks, shirts, and combat wear, were not even for remotely similar items (tr. 5/196, 8/32-34; exh. A-1000 through -1042).

81. The revision to MIL-C-44030, which appellant alleges constituted implementation of its VECP 2181, only affected items delivered after 18 September 1984 (exh. A-1, -1029), more than three years after 14 May 1981 when appellant ceased operations on all Government contracts (exh. A-1042, attachment 5 at 2, 21).

82. We find in the record before us no evidence to persuade us that any future contractors for the production of garments in accordance with MIL-C-44030 elected to use the alternative non-woven fusible fabric for interlinings in accordance with the July 1980 amendment to that specification (finding 33) or, if they did, thereby effected any cost savings for themselves or the Government.

B. VECP 1380

83. None of the military specifications upon which appellant bases its claim for future contract royalties (finding 58) dealt with an item which was essentially the same as the Air Force woman's pantsuit coat prescribed in Contract 2290 with regard to design, construction, purposes, and functions; and most of them, such as those for trousers, helmet covers, jumpers, raincoats, skirts, shirts, slacks, and vests, were for items which were not even remotely similar to the pantsuit coat (exh. A-1049 through -1074; tr. 2/101-03, 3/23, 5/196, 8-31-34, 61-62).

C. VECP 2880

84. None of the military specifications upon which appellant bases its claim for future contract royalties (finding 60) dealt with an item which was essentially the same as the Air Force woman's pantsuit coat prescribed in Contract 2290 with regard to design, construction, purposes, and functions; and most of them, such as those for coveralls, trunks, parkas, sweaters, smocks, shirts, slacks, and trousers, were for items which were not even remotely similar to the pantsuit coat (exh. A-1080 through -1092; tr. 2/101-03, 3/23, 5/196, 8/31-34, 61-62).

D. All of the VECP's

85. The Clothing and Textile Directorate of DPSC has never awarded a low rate initial production contract, and all of its contracts have always been firm fixed price contracts (tr. 9/63-64).

86. We find no evidence in the record of these appeals to establish that any of the subject contracts was, or was intended to be, a low rate initial production contract within the meaning of DAC #76-26 (finding 68) or that the items procured in any of the subject contracts were involved in any Five Year Defense Program or other planning documentation at the time any of appellant's VECP's were accepted.

87. Although appellant alleges in its posthearing brief that the Government acted in bad faith and without a rational basis in actions which it took concerning the VECP's which are the subjects of these appeals (findings 49, 60), we find no evidence in the recordd before us which supports that allegation, and we conclude that the Government's representatives acted in good faith and with good and rational cause in all of their actions with regard to those VECP's.

DECISION

Although appellant has expended years of effort, culminating in the many volumes of documentary evidence and the extensive testimony which it has presented to us in support of its claims in these appeals totalling approximately $180 million, we find those claims to be wholly without merit.

It is appellant's position that it is entitled to royalties because four of its five VECP's 1280, 2181, 2880, and 3380, were constructively accepted by the Government when the latter implemented the concepts in those proposed changes on subsequent, or future, contracts (findings 49, 60).

That position, however, is invalid as to three of those VECP's since there can no compensable constructive acceptance of a VECP under future contracts if a VECP was rejected without bad faith for the contract under which it was submitted. John J. Kirlin v. United States, 827 F.2d 1538, 1541 (1987); M. Bianchi of California, ASBCA Nos. 37029 and 37071, 93-1 BCA para. 25,309, at 126,089; appeal docketed, M. Bianchi of California v. Cheney, No. 93-1087 (Fed. Cir. 2 Dec. 1992).

Since VECP's 1280, 2880, and 3380 were rejected under appellant's contracts without bad faith on the part of the Government (findings 18, 39, 44, 47, 87), appellant could therefore, as a matter of law, not recover future contract royalties for those VECP's even if they had been implemented on future contracts.

Although VECP 2181 was accepted under Contract 2972 as an alternative provision, it was not implemented thereunder by appellant (findings 32, 35). Consequently, there was no unit cost reduction for that VECP under Contract 2972; and without such instant contract unit cost reduction, there can be no future contract royalties under the terms of the JO9 clause of the contract (finding 8), since the basis of future contract royalties is clearly stated in that clause, at (e)(3)(i) and (iii)(A), to be "the unit cost reduction under this instant contract."

Thus, there is no legal basis for appellant to recover future contract royalties for VECP 2181 even though it had been accepted.

All of these appeals must be denied as to collateral savings since neither the JO9 clause nor any other clauses in the subject contracts allow the contractor any compensation therefor (findings 8, 65, 66).

Furthermore, none of appellant's claims are supported by the facts surrounding them.

Three of these appeals, ASBCA Nos. 37798, 42243, and 42244, deal with VECP's (1280, 2181, and 3380) proposing contract changes to permit the use of Pellon fusible non-woven interlinings in various types of coats. However, it has been clearly established that at the time appellant submitted those VECP's the Government was engaged -- and had been for many years -- in a research, development, and experimentation program concerning the use of fusible fabrics, including Pellon non-woven fusibles, for interlinings and other garment components; that appellant was aware of that program; that the Government had already used fusible non-woven interlinings in some garments; and that the Government had even written a specification for non-woven fusible interlinings around a Pellon product (findings 13, 15, 74, 77).

The record before us compels the conclusion that not a single military specification for which appellant seeks future contract royalties was changed because of any of appellant's interlining VECP's (finding 78).

Furthermore, we have found no evidence to persuade us that the use of non-woven fusible interlinings in any contracts involving the military specifications cited by appellant resulted in any cost savings to the Government (finding 79).

Appellant's claims for VECP's 1280, 2181, and 3380 are also unallowable because none of the future contracts for which it seeks royalties were for essentially the same items as those purchased in appellant's contracts, except those embracing MIL-C-44030 (finding 80), and we find no evidence to establish that any contractors who produced garments in accordance with MIL-C-44030 elected to use non-woven fusible fabric as an alternative material for interlinings or delivered any items to the Government within the three-year royalty period prescribed in the JO9 clause of the contracts (findings 81, 82).

Likewise, ASBCA Nos. 37395 and 42416, dealing respectively with VECP's 1380 and 2880, cannot be sustained because none of the future contracts for which appellant seeks royalties in those appeals was for essentially the same item as that purchased in Contract 2290 (findings 83, 84).

The claim for VECP 1380 in ASBCA No. 37395 must also be rejected because no contractors which manufactured women's Air Force pantsuit coats after the submission of that VECP elected to utilize the V-T-280 cotton thread for gimps which was allowed as an alternative pursuant to the VECP (findings 24, 25, 27).

For the foregoing reasons, all of the subject appeals are denied.

Dated: 30 September 1993

/s/
JOSEPH B. AXELMAN
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

/s/
WILLIAM J. RUBERRY
Administrative Judge
Acting Chairman, Armed Services
Board of Contract Appeals

I concur

/s/
V. JOHN RIISMANDEL
Administrative Judge
Vice Chairman, Armed Services
Board of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA Nos. 37395, 37798, 42243, 42244, and 42416, Appeals of M. Bianchi of California, rendered in conformance with the Board's Charter.

Dated: 06 Oct. 1993

/s/
EDWARD S. ADAMKEWICZ
Recorder, Armed Services
Board of Contract Appeals

APPENDIX C

ORDER ON REHEARING:

U.S. COURT OF APPEALS FOR THE FEDERAL CIRCUIT
ON AUGUST 31, 1995

94-1166

M. BIANCHI OF CALIFORNIA, INC.,

Appellant,

v.

William Perry,
SECRETARY OF DEFENSE,

Appellee.

ORDER

United States Court of Appeals for the Federal Circuit

ORDER

A combined petition for rehearing and suggestion for rehearing in banc having been filed by the APPELLANT, and the petition for rehearing having been referred to the panel that heard the appeal, and thereafter the suggestion for rehearing in banc having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the suggestion for rehearing in banc be, and the same hereby is, DECLINED.

The mandate of the court will issue on September 11, 1995 unless another time becomes appropriate under Rule 41.

FOR THE COURT,
FRANCIS X. GINDHART, CLERK

Dated: August 31, 1995

By /s/
Diane M. Frye
Chief Deputy Clerk

cc: ROBERT A. BRUNETTE
GEOFFREY C. COOK

M. BIANCHI OF CALIFORNIA V DEFENSE, 94-1166
(BCA - 37395, 37798)

Note: Pursuant to Fed. Cir. R. 47.6, this order is not citable as precedent. It is a public record.

APPENDIX D

JUDGMENT SOUGHT TO BE REVIEWED:

U.S. COURT OF APPEALS FOR THE FEDERAL CIRCUIT
ON JULY 21, 1995

United States Court of Appeals for the Federal Circuit

94-1166

M. BIANCHI OF CALIFORNIA,

Appellant,

v.

William J. Perry
DEPARTMENT OF DEFENSE,

Appellee.

Judgment

ON APPEAL from the Armed Services Board of Contract Appeals in CASE NO(S). 37395, 37798, 42243, 42244 and 42416 (consolidated) This CAUSE having been heard and considered, it is

ORDERED and ADJUDGED:

AFFIRMED

ENTERED BY ORDER OF THE COURT

DATED JULY 21, 1995

/s/
Francis X. Gindhart, Clerk

ISSUED AS A MANDATE: September 11, 1995

APPENDIX E

ARMED SERVICES PROCUREMENT REGULATIONS (ASPR):

ASPR 1-703.1 and .2 (entitled "Acquisition Savings" and "Collateral Savings", respectively), DPC #76-9, dated August 30, 1979;

ASPR Clause 1-704.44 (entitled "Value Engineering Incentive (1977 SEP)"), DPC #76-10, dated September 26, 1977; and

ASPR 1-1706. (entitled "Sharing Arrangements"), DAC #76-26, dated December 15, 1980.

GENERAL PROVISIONS

1-1703.1 *Acquisition Savings* are those which accrue from the application of value engineering change proposals to contracts for supplies or services. Acquisition savings include instant, concurrent, and future contract savings (see paragraph (e) *"Sharing"* of the clause in 7-104.44(a)(1)).

(a) Instant contract savings are those measurable net cost reductions on the contract under which the value engineering change proposal was submitted by the contractor and accepted by the Government. In the case of requirements or other indefinite delivery type contracts, basic ordering agreements, multi-year contracts, fixed-price contracts providing for prospective price redetermination, or contracts in which supplemental agreements or other modifications increase the quantity of items or add items to the contract, see paragraph (j) of the clause in 7-104.44(a)(1) for the appropriate definition of *"instant contract"*.

(b) Concurrent contract savings are those measurable net reductions in the price of a concurrent contract. For purposes of Value Engineering, a concurrent contract is a contract which has been let by the same procuring activity for essentially the same item but which is other than the contract under which the VECP was accepted by the Government.

(c) Future contract savings are either (i) those measurable net reductions in the price of a future contract (other than the contract under which the value engineering change proposal was accepted) let by the same procuring activity for essentially the same item or (ii) a lump sum payment paid to the contractor at the time the value engineering change proposal is accepted and based upon estimated future applications of the accepted VECP in future contracts let by the same procuring activity for essentially the same item. Such savings are generally computed based upon the unit cost reduction under the Instant contract without deducting any cost of development or implementation.

(d) On instant and future contracts, the contractor's profit/ fee shall be excluded when calculating the net savings.

1-703.2 *Collateral Savings* are those measurable net reductions in the cognizant Military Department's overall, documentable projected costs of operation, maintenance, logistic support, or Government-furnished property, when such savings result from the VECP submitted by the contractor, whether or not there is any change in the acquisition cost (see paragraph (e)(4) of the clause in 7-104.44(a)(1)). This paragraph (e)(4) may be excluded from a contract or class of contracts when the HPA determines that the cost of computing and tracking collateral savings will exceed benefits to be derived.

7-104.44 *Value Engineering (VE).*

(a) Value Engineering Incentive Clause.

(1) In accordance with 1-702.1 and 1-1707, insert the following clause in firm fixed-price contracts, fixed-price contracts with economic price adjustment or fixed-price contracts providing for prospective price redetermination:

VALUE ENGINEERING INCENTIVE (1977 SEP)

(a) *Application*. This clause applies to a contractor developed and documented Value Engineering Change Proposal (VECP) which:

(i) requires a change to this contract to implement the VECP, and

(ii) reduces the overall costs to the cognizant Military Department without impairing essential functions or characteristics, provided that it is not based:

(A) solely on a change in deliverable end item quantities; or

(B) a change in R&D end item or test quantities due solely to results of previous testing under this contract; or

(C) solely on a change to the contract type.

(b) *Documentation*. As a minimum, the following information shall be submitted by the Contractor with each VECP:

(i) a description of the difference between the existing contract requirement and the proposed change, and the comparative advantages and disadvantages of each, justification when a function or characteristic of an item is being altered, and the effect of the change on the performance of the end item;

(ii) an analysis and itemization of the requirements of the contract which must be changed if the VECP is accepted and a recommendation as to how to make each such change (*e.g.* a suggested specification revision);

(iii) a separate detailed cost estimate for both the existing contract requirement and the proposed change to provide an estimate of the reduction in costs, if any, that will result from acceptance of the VECP, taking into account the costs of development and implementation by the

Contractor (including any amount attributable to subcontracts in accordance with paragraph (h) below);

(iv) a prediction of any effects the proposed change would have on collateral costs to the Military Department such as Government- furnished property costs, costs of related items, and costs of maintenance and operation;

(v) a statement of the time by which a contract modification accepting the VECP must be issued so as to obtain the maximum cost reduction, noting any effect on the contract completion time or delivery schedule; and

(vi) identification of any previous submission of the VECP, including the dates submitted, the agencies involved, the numbers of the Government contracts involved, and the previous actions by the Government, if known.

(c) *Submission*. VECPs shall be submitted to the Procuring Contracting Officer (PCO). When the contract is administered by other than the purchasing office, a copy of the VECP shall be submitted simultaneously to the Administrative Contracting Officer (ACO). VECPs shall be processed expeditiously; however, the Government shall not be liable for any delay in acting upon any VECP submitted pursuant to this clause. If the evaluation period is likely to exceed forty-five (45) calendar days, the PCO shall promptly notify the Contractor of the estimated decision date and provide the reasons for the additional time required. The Contractor has the right to withdraw, in whole or in part, any VECP not accepted by the Government within the period specified in the VECP.

(d) *Acceptance*. The Contracting Officer may accept, in whole or in part, by contract modification either before or within a reasonable time after performance has been completed under this contract, any VECP submitted pursuant to this clause. Until a contract modification applies a VECP to this contract, the Contractor shall remain obligated to perform in accordance with the terms of the existing contract. Contract modifications made pursuant to this clause will so state. The decision of the Contracting Officer as to the acceptance of any VECP under this contract (including the decision as to which clause is applicable to the proposal if this contract contains both a "Value Engineering Incentive" and a "Value Engineering Program Requirement" clause) shall be final and shall not be subject to the "Disputes" clause of this contract.

(e) *Sharing*. If a VECP submitted by the Contractor pursuant to this clause is accepted, the Contractor shall share in savings realized by the Government in accordance with the following provisions:

(1) Instant Contract.

(i) Definitions.

(A) Instant contract savings to the Contractor (ICS) is the unit cost reduction times the number of units affected in the instant contract. The proposed unit cost reduction includes estimated allowable contractor development and implementation costs (CC). The Contractor's development and implementation costs include any subcontractor development and implementation costs and any subcontractor incentive payments (see (h) below). For purposes of this clause, contractor development costs are those costs incurred after the Contractor has identified a specific VE project and prior to acceptance by the Government.

(B) Government Costs (GC) are those DoD costs which directly result from development and implementation of the VECP, such as test and evaluation of the VECP, and any increased costs in DoD operations, maintenance, and logistic support.

(ii) Calculations and Actions:

(A) Calculate GC and ICS.

(B) If ICS exceeds GC, calculate fifty percent (50%) (Government share) of the sum of ICS and GC, *i.e.*, (5 (ICS plus GC)), unless this is a VE Program Requirement Change (VEPRC), in which case calculate (.75 ICS plus .25 GC). In either case, subtract the result from the contract price.

(C) If GC exceeds ICS, but acceptance of the VECP is still desirable due to concurrent or future savings, reduce the instant contract price by the amount of ICS and offset the amount by which GC exceeds ICS against concurrent or future savings.

(D) If the Contractor's cost of developing and implementing the VECP would result in an increase in the instant contract price, but the VECP is still desirable due to concurrent or future savings, equitably adjust the instant contract price in accordance with the "Changes" clause. In addition, offset the increase in the instant contract price and any GC against concurrent or future contract savings.

(E) See (e)(3)(ii) for those actions to be taken when a future contract is expected.

(2) Concurrent Contracts.

(i) If the VECP accepted under this contract is also used on concurrent contracts of the purchasing office for essentially the same items, the Contractor shall be paid a share of any savings as calculated in (ii) below.

(ii) Calculations:

(A) Determine the reduction in the price of each concurrent contract(s) as a result of incorporating the VECP.

(B) Subtract from the total amount in (A) any government costs (GC) not yet offset (if GC was greater than ICS) in (e)(1)(ii)(C) or (D) above, any increase in the instant contract price, i.e., if ICS was negative in (e)(1)(ii)(D). If the resulting number is positive, multiply it by fifty percent (50%) (25% if this is a VEPRC). Add this amount to the instant contract price.

(3) Future Contracts.

(i) Definition. The term unit cost reduction for future contract sharing shall be the unit cost reduction under this instant contract without deducting any cost of development or implementation.

(ii) If the VECP accepted under this contract is used on future purchases of essentially the same item by the purchasing office, or its successor, the Contractor shall share in the savings on all affected end items scheduled for delivery not later than three (3) years after the acceptance of the first item incorporating the VECP, or until the originally scheduled delivery date of the last affected end item under the instant contract, whichever is later. When sharing on future contracts is expected, the Contractor shall be responsible for the following:

(A) Maintaining records adequate to support identification of the first delivered unit to which the VECP applies. These records are considered an integral part of contract documentation and shall be maintained for a period of three years after final payment on the contract under which the VECP was accepted.

(B) Annotating the DD Form 250, Material Inspection and Receiving Report, which applies to the initial unit covered by the VECP with the following statement:

"This is the initial unit delivered which incorporates VECP No_____, Contract Modification No._____, dated_____."

(iii) Calculations. At the time each eligible future contract is awarded:

(A) Determine the number of units scheduled to be delivered prior to expiration of the contractor sharing period determined in (ii) above. Multiply this by the unit cost reduction as defined in (e)(3)(i).

(B) Subtract from the total amount in (A) any Government costs or instant contract increases not yet offset in (e)(1)(ii)(C) or (D), or in (e)(2)(ii)(B), or in other contracts awarded since acceptance of the VECP. If the resulting number is positive, multiply it by fifty percent (50%) (25% if this is a VEPRC) and add the result to the instant contract price.

(4) Collateral Savings. If an accepted VECP results in a measurable net reduction in the cognizant Military Department's overall documentable projected costs of maintenance, operation, logistic support or Government-furnished property, which exceeds any increase in costs attributable to incorporation of such VECP, including acquisition costs, the contract shall be increased by twenty percent (20%) of the projected net reduction in ascertainable collateral costs (*i.e.*, savings determined to be realized during an average year of use of the item in which the change is incorporated) and, if applicable, of the actual savings accruing from a change or reduction of Government-furnished property under the instant contract. However, such increase representing the Contractor's share of collateral savings shall, in no event exceed the price of this contract of $100,000, whichever is greater. The determination of the amount of collateral savings, if any, will be made solely by the Government and shall not be subject to the "Disputes" clause of this contract. In all cases, degradation of performance, service life, or capability shall be a consideration in the determination of actual savings to the Military Department.

(f) *Payment*. The Contractor's concurrent and future contract shares should be paid upon modification of concurrent contracts or future contract award, or within six (6) months thereafter. However, any such payments are subject to the condition that to the extent the Government does not receive delivery of and accept all items on which the share is paid, the contractor shall reimburse the Government the proportionate share of the payments. If this clause is modified to provide for lump sum payments, such payments shall be made upon modification of the instant contract.

(g) Operation and Maintenance Contracts. If this is a contract for overhaul or maintenance (including repair, alteration, modification or modernization), the Contractor will be paid a share of future contract savings

realized by the Government only on overhaul and maintenance of the designated items accomplished by purchase, under contract, by the designated purchasing office. Only collateral savings will be paid on application of accepted VECPs to overhaul and maintenance of items within Government resources.

(h) *Subcontracts.* The Contractor shall include appropriate VE arrangements in any subcontract of $100,000 or greater, and may include such arrangements in contracts of lesser value. To compute any adjustment in the contract price under paragraph (e)(1) above, the Contractor's cost of development and implementation costs of a subcontractor and any VE incentive payments to a subcontractor, which clearly pertain to such VECP. However, no such payment or accrual to a subcontractor will be permitted, either as a part of the contractor's development or implementation costs or otherwise, to reduce the Government's share on collateral savings or additional purchases as contemplated by paragraphs (e)(2), (3) or (4) of this clause.

(i) *Data.* The Contractor may restrict the Government's right to use any sheet of a VECP or of the supporting data, submitted pursuant to this clause, in accordance with the terms of following legend if it is marked on such sheet:

> "This data furnished pursuant to the Value Engineering clause of contract ___ shall not be disclosed outside the Government, or duplicated, used, or disclosed, in whole or in part, for any purpose other than to evaluate a VECP submitted under said clause. This restriction does not limit the Government's right to use information contained in this data if it is or has been obtained, or is otherwise available, from the Contractor or from another source, without limitations."

In the event of acceptance of a VECP, the Contractor hereby grants to the Government unlimited rights, as defined in the clause of ASPR 7-104.9(a), in the VECP and supporting data, except that, with respect to data which qualifies as and is submitted as limited rights technical data in accordance with the clause of ASPR 7-104.9(a), the Government shall have the rights specified in the contract modification referred to in paragraph (d) hereof and the data shall be appropriately marked.

(j) *Miscellaneous Provisions*

(1) For purposes of sharing under paragraph (e)(1) above, the term "instant contract" shall not include any modifications of the instant contract, executed after acceptance of the particular VECP, by which the Government increases the quantity of any item or adds any item, nor shall it include any extension of the instant contract through exercise of an option provided under this contract after acceptance of the VECP. Such modifications and extensions shall be considered "future contracts" within the provisions of paragraph (e)(3) of this clause.

(2) If this is an indefinite delivery type contract, the term "instant contract" for purposes of sharing under paragraph (e)(1) above shall include only those orders actually placed by the Government up to the time the particular VECP is accepted. All orders placed subsequent to the acceptance of the particular VECP shall be considered "future contracts" within the provisions of paragraph (e)(3) of this clause.

(3) If this clause is included in a basic ordering agreement, the term "instant contract", for purposes of sharing under paragraph (e)(1) above, shall be the order under which the particular VECP is approved. Other orders under the same agreement shall be considered either "concurrent contracts" (if awarded prior to acceptance of the VECP) or 'future contracts' (if awarded after acceptance of the VECP), within the provisions of paragraph (e)(2) or (e)(3) of this clause respectively.

(4) If this clause is included in a multi-year contract, the term "instant contract" for the purpose of sharing under paragraph (e)(1) above, shall be the funded contract at the time the VECP is approved, and items purchased under subsequent funding under this contract shall be treated under the future contract VE sharing provisions in paragraph (e)(3) of this clause. The sharing period shall be the entire life of the multi-year contract, or three (3) years after delivery of the first item incorporating the VECP, whichever is longer.

(5) If this clause is included in a fixed-price contract providing for prospective price redetermination, the term "instant contract" for purposes of sharing under paragraph (e)(1) above shall be that period for which firm prices have been established. The remaining periods under this contract shall be treated under the future contract VE sharing provisions in paragraph (e)(3) of this clause.

(6) The Contracting Officer may require the Contractor to provide written notification prior to undertaking significant expenditures for VECP effort.

(k) *Relation To Other Incentives.* Those benefits of an approved VECP which are not rewardable under performance, design to cost (production unit cost, operating and support (O&S) costs, reliability and maintainability (R&M) or similar incentives of the contract shall be rewarded under subparagraph (e) of this clause. The targets of such incentives affected by the VECP shall not be adjusted because of the acceptance of the VECP. If the contract does not provide such incentives to better specified targets, the VE sharing shall apply only to the amount of achievement better than target.

(End of clause)

GENERAL PROVISIONS

Part 17 - Value Engineering

1-1700 Value Engineering (VE).

. . . .

1-1706 Sharing Arrangements. The two types of savings shared by the Government and the contractor as a result of accepted VECPs are acquisition savings and collateral savings.

1-1706.1 *Sharing of Acquisition Savings.*

(a) The sharing base for acquisition savings is the number of affected end items on contracts of the contracting office approving the VECP. The Head of the Contracting Activity (HCA) may extend the sharing base from the contracting office throughout the activity if the HCA determines in writing that it would be more equitable or would significantly increase the contractor's incentive. The sharing base may be further expanded by the Secretary concerned. The sharing rates (Government/contractor) for acquisition savings for supplies and services are based on the type of contract, the Value Engineering clause, and the type of savings as follows:

	Incentive (Voluntary)		Program Requirement (Mandatory)	
TYPE OF CONTRACT	Instant	Concurrent and Future	Instant	Concurrent and Future
Fixed-Price (Other than Incentive)	50/50	50/50	75/25	75/25
Incentive (Fixed-Price or Cost)	*	50/50	*	75/25
Cost - Reimbursement** (Other than Incentive)	75/25	75/25	85/15	85/15

* Same ratio as the contract's cost incentive ratio.

** Includes cost-plus-award-fee contracts.

(b) Sharing on construction contracts applies only to savings on the instant contract. The sharing rates (Government/contractor) are as follows:

Fixed-Price*	45/55
Cost-Reimbursement*	75/25

*Other than incentive

(c) The contractor shall share in the savings on all affected units until the originally scheduled delivery date of the last affected unit under the instant contract or for 3 years after acceptance of the first unit incorporating the VECP, whichever is longer. For engineering development and low rate initial production contracts, the future sharing period shall encompass scheduled deliveries, equal in number to the quantity required over the highest 36 consecutive months of planned production, based on the Five Year Defense Program (FYDP) or other planning documentation at the time the VECP is accepted. Savings are paid through the contract under which the VECP was accepted. Within 9 months after concurrent contracts have been modified to reflect price reductions attributable to use of the VECP, the contracting officer shall modify the instant contract to provide the contractor's share of savings. On incentive contracts, the contractor's share of concurrent, future, and collateral savings shall be paid as a separate firm fixed-price contract line item on the instant contract. The contractor shall be responsible for maintaining, for 3 years after final payment on the contract under which the VECP was accepted, records adequately identifying the first delivered unit incorporating the applicable VECP.

(d) The contractor's share of future contract savings may be paid as subsequent contracts are awarded or in a lump-sum payment at the time the VECP is accepted. The contracting officer ordinarily shall make calculations as future contracts are awarded and, with 3 months after their award, modify the instant contract to provide the contractor's share of savings. Use of the lump-sum method must be agreed to by the contractor. For future acquisition savings calculated under the optional lump-sum method, the sharing base is an estimate of the number of items which will be purchased by the contracting office during the sharing period. In deciding to use to more convenient lump-sum method for an individual VECP, the contracting officer shall consider:

(i) the accuracy with which the number of items to be purchased during the sharing period can be estimated and the probability of actual production of the projected quantity;
(ii) the availability of funds for a lump-sum payment; and
(iii) the administrative expense of otherwise amending the instant contract as future contracts are awarded.

(e) The contractor's profit or fee shall be excluded when calculating the net savings on instant and future contracts.

(f) Departments shall establish procedures for funding and payment of the contractor's share of future savings.

1-1706.2 *Sharing of Collateral Savings.* The contractor's share of collateral savings is 20% of the estimated savings to be realized during an average year of use but shall not exceed (i) the contract's firm fixed-price, target price, target cost, or estimated cost at the time the VECP is accepted; or (ii) $100,000, whichever is greater.

APPENDIX F

MEMORANDUM dated October 26, 1979 of Roy W. Roth, Chief of Fiber & Fabric Technology Branch of the U.S. Army Research & Development Center, Natick, MA ("NATICK")

DRDNA-VTF
C, Tech Sec

Fusible Interlinings
C, F&FT Br

26 October 79
/mb/2634

1. Reference DF dtd 19 Oct 79 to C, TR&ED from Dir, CEMEL.

2. Reference Memo dtd 24 Oct 79 to C, F&FT Br from B. Snigger.

3. My own experiences with the manufacture and use of fusible interlinings support the conclusions in 1 and 2 that acceptable garments can be and are being made in Industry with fusible interlinings. Technology has advanced within the last few years to allow numerous items to be so manufactured.

4. Despite the advances in Industry, military procurements incorporating fusible interlinings seem to be at a standstill. Unfortunately, results from the 250 test coats made in 1975 with fusible interlinings are not available. D. Cerow tells me that his Office had not received adequate results from the field to constitute a report. This test, therefore, has to be considered inconclusive.

5. I would like to see a stepwise test program formulated, identifying where fusible interlinings should be possible, i.e., specific items, what savings could be realized with each item (estimated labor and material savings) and a recommended R&D effort to evaluate fusible interlinings in selected apparel-detailing items, timing and estimated man-hour effort involved. Also, items available within other services using fusible interlinings should be identified where they exist.

6. Do we have any market research reports identifying where fusible interlinings are used and are likely to be used?

7. A response to para. 5. is requested by 15 Nov.

ROY W. ROTH
Chief, Fiber & Fabric
Technology Branch

CF: C, TR&ED

CERTIFICATE OF SERVICE

I hereby certify that three (3) copies of each of the foregoing PETITION FOR WRIT OF CERTIORARI of Petitioner M. BIANCHI OF CALIFORNIA were served on the following parties by Certified United States Mail, return receipt requested this 28th day of November 1995:

The Honorable William J. Perry
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The Pentagon
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Washington, D.C. 20301

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Francis X. Gindhart
Clerk of the Court
Court of Appeals for the Federal Circuit
717 Madison Place, N.W.
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Dated: November 28, 1995

/s/

Robert A. Brunette, Esq.
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Attorney for Petitioner
M. BIANCHI OF CALIFORNIA